15268

(18,208.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 355.

THE HOME LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

A. A. FISHER, AS EXECUTOR OF THE ESTATE OF ALEXANDER SUTER MACLEAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

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1 A. A. FISHER, as Ex'r, etc., *vs.* HOME LIFE INSURANCE CO.

In the Circuit Court of the United States for the Northern District of Florida, Fifth Judicial Circuit.

A. A. FISHER, as Executor of the Last Will & Testament of Alexander S. McLean, Dec'd, a Citizen of the State of Florida, *vs.* THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws of and a Citizen of the State of New York.	Assumpsit: Damages, $8,000.00.

Be it remembered that on the twenty-first day of December, in — year of our Lord one thousand eight hundred and ninety-nine came one A. A. Fisher, as executor of the last will and testament of Alexander S. McLean, deceased, and filed in the clerk's office of the said court a præcipe for the issuance of *summons ad respondendum* in the above-entitled cause, which was in the words and figures following, to wit:—

In the Circuit Court of the United States for the Northern District of Florida, Fifth Judicial Circuit.

A. A. FISHER, as Executor of the Last Will & Testament of Alexander S. McLean, Dec'd, a Citizen of the State of Florida, *vs.* THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws of and a Citizen of the State of New York.	Assumpsit: Damages, $8,000.00.

The clerk of said court will please issue *summons ad respondendum* in the above-entitled case, and make the same returnable according to law.

JNO. C. AVERY &
TUNISON & LOFTIN,
Pl'ff's Att'ys.

Endorsements: A. A. Fisher, etc., *vs.* The Home Life Insurance Co. Præcipe. Filed December 21st, 1899. F. W. Marsh, clerk.

2 And afterwards and on the same day, to wit: on the 21st day of December, A. D. 1899, there issued out of the clerk's office of the said court *summons ad respondendum*, directed to the marshal of the said district which was thereupon delivered to him and by him executed and returned into the said clerk's office with his return endorsed thereon, which summons was in the words and figures following, to wit:

United States Circuit Court, Fifth Circuit, Northern District of Florida.

The President of the United States to the marshal of the northern district of Florida, Greeting:

You are hereby commanded to summon the Home Life Insurance Company, a corporation under the laws of, and a citizen of, the State of New York, if it may be found in your district, to be and appear before the circuit court of the United States, fifth circuit and northern district of Florida, at the rule day of said court, to be held at the clerk's office, in the city of Pensacola, on the first Monday of January, 1900, next, to answer unto A. A. Fisher, as executor of the last will and testament of Alexander S. McLean, deceased, a citizen of the State of Florida, in said court, on a plea of assumpsit, wherein the plaintiff claims damages to the amount of eight thousand dollars. And have you then and there this writ.

[SEAL.] Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this court at the city of Pensacola, in said district, this twenty-first day of December, A. D. 1899.

F. W. MARSH, *Clerk.*

JOHN C. AVERY AND
TUNISON & LOFTIN,
Plaintiff's Attorneys.

Endorsements: United States circuit court, northern district of Florida. A. A. Fisher, ex'r, etc., *vs.* Home Life Ins. Co. Summons. Issued December 21st, 1899. Returnable Jan. 1st, 1900. Ret. and filed Dec. 28th, 1899. Jno. C. Avery, Tunison & Loftin, plaintiff's attorneys.

3 *Marshal's Return.*

Executed the within summons on the 22nd day of December, 1899, at Pensacola, Fla., upon Thomas C. Watson, general agent of the "Home Life Insurance Co." for the State of Florida, he being the highest officer of the Co. found in the northern district of Florida (neither the president, the vice-president, the general manager, nor any of the directors could be found. they not being residents of the State of Fla.) by handing him a true copy.

T. F. McGOURIN,
U. S. Marshal,
Per H. WOLF, *Ch. O. D.*

And thereafter, to wit: on the 30th day of December, A. D. 1899, the plaintiff in the said cause came into court, by his attorneys, and filed his declaration, which was in the words and figures following, to wit:

In the Circuit Court of the United States of the Fifth Judicial Circuit for the Northern District of Florida.

A. A. Fisher, who is a citizen of the State of Florida, as executor of the last will and testament of Alexander S. Maclean, the plaintiff, by John C. Avery and Tunison & Loftin, his attorneys, sues The Home Life Insurance Company, a corporation under the laws of, and a citizen of, the State of New York, the defendant;

For that, to wit: on the 28th day of August, A. D. 1899, the defendant made its policy of insurance and delivered the same to the said Alexander S. Maclean, the testator of the plaintiff, whereby the defendant did, in consideration of the statements and agreements made in the application therein referred to, and of the payment in advance of forty-five and $\frac{20}{100}$ ($45.20) dollars, and of the promise by the said testator to pay the same amount thereafter, at the office of the defendant, in the city of New York, on or before noon of the 28th day of August, November, February and May in every year during the continuance of the contract of the said policy, or until twenty (20) years' premiums should have been duly paid, promised and agreed to pay five thousand ($5,000.00) dollars to the said testator of the plaintiff, his executors, administrators and as-
4 signs, at the office of the defendant in the city of New York, immediately upon receipt and approval of proof of death of the said testator of the plaintiff, provided said policy should be then in force:

And the plaintiff avers, that, on the 16th day of October, 1899, after the said advance payment made as aforesaid, and before any other payments became due under the terms of the said policy, and while the said policy was in force, the said testator of the plaintiff died; and, before the institution of this suit, proofs of the death of the said testator were furnished by the plaintiff, who had previously qualified and received letters testamentary as executor of the last will and testament of the said testator; and the said proofs were received by the said defendant, the said policy being then in force, and a copy thereof, together with the application, options, benefits and conditions therein referred to, is hereto annexed marked Exhibit "A," and made a part hereof:

And the plaintiff further avers, that, though the said testator kept and performed all things in the said policy contained, on his part to be kept and performed, the said defendant has not paid to the plaintiff, as executor, as aforesaid, or otherwise, the said sum of five thousand ($5,000.00) dollars, less the balance of premiums for the current year, or any part thereof, and so to do has hitherto wholly neglected and refused, though often requested so to do:

To the damage of the plaintiff as executor, as aforesaid, of eight thousand ($8,000.00) dollars, and therefore he sues.

JNO. C. AVERY AND
TUNISON & LOFTIN,
Att'ys for Pl't'ff.

Bill of Particulars.

Principal amount claimed under the policy.....	$5,000.00
Less three (3) quarterly premiums @ $45.20	135.60
	$4,864.40

Interest to be added.
Fees as provided by laws of Florida will be demanded.

5 EXHIBIT "A."

The Home Life Insurance Co.

Number 91540. Age, 34.
Amount, $5,000. Premium, $45.20.
(Int. rev., $4.00.)

By this policy of assurance, in consideration of the statements and agreements made in the application for this policy, which are hereby made a part of this contract, and of the payment in advance of forty-five dollars and twenty cents, and of the payment of the same amount to be made thereafter, at the office of the said company in the city of New York, on or before noon of the twenty-eighth day of August, November, February and May in every year, during the continuance of this contract or until twenty full years' premiums shall have been duly paid,

Does promise and agree to pay five thousand dollars to Alexander S. Maclean, his executors, administrators or assigns, at the office of the said company in the city of New York, immediately upon receipt and approval of proofs of death, of Alexander S. Maclean of Pensacola in the county of Escambia, State of Florida, provided this policy be then in force.

The options, benefits and conditions, printed or written, by the said company upon the back of this policy are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the said Home Life Insurance Company has by its president or vice-president and secretary, signed and delivered this contract at the city of New York, in the State of New York, this twenty-eighth day of August, one thousand eight hundred and ninety-nine.

GEO. E. IDE, *President.*

(S'g'd) E. W. GLANWIN, *Secretary.*

6 This policy contains no restrictions as to residence or travel.

Options, Benefits, and Conditions.

Non-forfeiture.—If, after three full annual premiums have been duly paid to the company, this policy should thereafter lapse in consequence of the non-payment of any premiums subsequently due (provided this policy is not terminated by death within 30 days of

grace allowed in the payment of premiums, and provided demand is made with the legal surrender of this policy, within six months after such lapse) the company will give the holder of this policy the option of either a cash-value or a non-participating paid-up life policy, as herein provided, as specified in the following Table- B and C of guaranteed options, provided there is no indebtedness under this policy.

II.

Loans.—The company will loan to the insured upon written application to its home office at the third or any subsequent anniversary of this policy, or within thirty days thereafter, during the dividend endowment period, under the terms of the company's loan agreement then in use, an amount not exceeding the sum shown in the following Table A of guaranteed options, including any previous loan then unpaid, provided:

(*a.*) That the policy shall be legally assigned to, and deposited with the company as collateral security;

(*b.*) That the premiums shall have been paid in full to the time when the loan is made, including the entire premium for the succeeding insurance year; and

(*c.*) That interest shall be paid semi-annually at the rate of six per centum per annum on all such loans.

Guaranteed Options under the Conditions Specified in This Policy.

At end of—	Table A. Loan value.	Table B. Cash-surrender value.	Table C. Paid-up value.
3rd year.....	$250.	$150.	$750.
4th "	375.	250.	1,000.
5th "	460.	375.	1,250.
6th "	545.	460.	1,500.
7th "	640.	545.	1,750.
8th "	730.	640.	2,000.
9th "	960.	730.	2,250.
10th "	1,070.	960.	2,500.
11th "	1,195.	1,070.	2,750.
12th "	1,325.	1,195.	3,000.
13th "	1,455.	1,325.	3,250.
14th "	1,775.	1,455.	3,500.
15th "	1,935.	1,775.	3,750.
16th "	2,100.	1,935.	4,000.
17th "	2,270.	2,100.	4,250.
18th "	2,450.	2,270.	4,500.
19th "	2,675.	2,450.	4,750.
20th "	.....	2,635.	5,000.

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III.

Dividend endowment.—Each and every dividend of profits which may be made on this policy shall be retained by the company and shall be accumulated until the expiration of twenty years from the 28th day of August, 1899, at which time only such accumulation shall become due and payable to the insured in accordance with the following options of settlement.

IV.

Benefits.—If the insured be living on the 28th day of August, nineteen hundred and nineteen, on which date the dividend endowment of this policy ends, and if the premiums have been paid in full to such date, the insured shall be entitled to one of the following benefits:

1st. To exchange this policy for its entire value, (said value consists of the guaranteed reserve twenty-six hundred and thirty-five dollars, $2,635, and in addition thereto the dividend endowment accumulation as provided herein) either

(*a.*) In cash,

(*b.*) In an annuity, payable during the lifetime of the insured,

(*c.*) In a paid-up life policy, subject to evidence of good health of the insured, satisfactory to the company, for the amount in excess of the original sum assured.

2nd. To continue this policy with a new dividend endowment period of any multiple of five years and receive the dividend endowment accumulation as provided herein, either

(*a.*) In cash,

(*b.*) In an annuity, payable during the lifetime of the assured,

(*c.*) In additional paid-up life insurance, subject to evidence of good health of the insured, satisfactory to the company.

V.

Payment of premiums.—All premiums are due and payable at the home office of the company in the city of New York, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president or secretary, and countersigned by such agents. If any premium be not thus paid on or before the date when due, then this policy shall become void and all payments previously made shall remain the property of the company, except as herein provided. All premiums are payable in cash unless otherwise specified in this policy, and no other form of payment will be accepted, unless agreed to in writing by the president, vice-president or secretary.

VI.

Grace.—Should default be made at any time hereafter in the payment of any premium due on this policy as herein provided, the company will waive such default and accept the payment of said premium, provided the amount thereof with interest thereon from the date of default be tendered to it within thirty days after such default.

VII.

Reinstatement.—If this policy should lapse for the non-
8 payment of any premium it may be reinstated upon written application, made within six months after such lapse, (provided a paid-up policy has not already been issued in lieu thereof) accompanied by evidence of good health satisfactory to the company, and the payment of all overdue premiums with interest thereon at the rate of six per centum per annum.

VIII.

Incontestability.—After two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are, that the premium shall be duly paid, and that the requirements of the company as to age, and military or naval service in time of war shall be observed.

IX.

Indebtedness.—Any indebtedness to the company under this policy, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or from any benefit hereunder.

X.

Assignments.—Any assignment of this policy shall be made in duplicate and both copies sent to the home office, one of them to be retained by the company. Blanks for this purpose will be furnished upon application. The company assumes no responsibility for the validity of any assignment.

XI.

Alterations.—No person except the president, vice-president or secretary, has power on behalf of the company to make or modify this contract, to extend the time for paying a premium, to bind the company by making any promise, or by accepting any representation or information not contained in the application for this policy.

Copy of Application for Insurance to the Home Life Insurance Company, 256 Broadway, New York.

1. Full name of the person whose life is to be insured. Alexander Suter Maclean.

B. Residence: Town, (give street address) Pensacola. County, Escambia. State, Fla.

C. Place of business, (give street address). Pensacola, Fla.

NOTE.—If a partner or in the employ of any firm, company or business house, give name of firm or employer.

D. Shall notices of premiums coming due be addressed to the place of business as stated? Yes.

9 2. A. Occupation. Journalist.

B. Have you any other occupation than that herein specified? No.

NOTE.—It is not a sufficient answer to state, for example, "clerk," "book-keeper," "salesman," "merchant," "machinist," "mechanic," "laborer." Specify the particular branch of business or trade, or the article dealt in, or the kind of labor performed.

3. A. Have you ever been engaged in the sale, or manufacture of intoxicating liquors? ——.

B. Are you now employed where liquor is sold or manufactured? ——.

4. Place and date of birth. Place, Aberdeenshire; county, ——; State, Scotland; year, 1866; month, Dec.; day, 23; age at nearest birthday, 34.

5. Amount of insurance, $5,000; table No. 48. *Premiums, payable [annually, $——; semi-annually, $——]† quarterly, $45.20. *On what plan? Life, ordinary; life, —— annual premium; —— year endowment, —— annual premiums. Dividend endowment period, —— years.

*NOTE.—Strike out the plan and mode of payment not desired.

6. A. Full name of the person for whose benefit the insurance is to be effected. Myself.

B. Residence. ——.

C. Relationship to the person to be insured. ——.

D. Has the beneficiary any interest in the life of the person to be insured equivalent to the amount of the insurance applied for? ——.

7. A. Has the full premium been paid in cash? A. ——.

B. Has a conditional receipt been given? If so, what is its number? B. ——.

C. Has any payment been made under this application? If so, what amount and to whom? C. ——.

8. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy had not been issued as applied for? If so, when and to what company? State particulars. A. No.

B. Is any negotiation for other insurance pending or contemplated? B. 10,000 in the New York Life.

10 9. A. Do you drink wine, spirits, or malt liquors? A. Yes.

B. If so, which of these, and to what extent? B. Moderately.

C. Have you ever used them freely or to excess? C. No.

D. Have you ever used opium, morphine, chloral, cocaine, or other narcotics? If so, which of them, and to what extent? D. No.

E. Have you ever had special treatment for the alcohol habit, the cocaine or morphine habit? E. No.

F. To what extent do you use tobacco? F. Smoke pipe very seldom.

[† Words enclosed in brackets erased in copy.]

I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application that all of the foregoing statements and answers are true, full and complete *all of the foregoing statements and answers are true, full and complete*, whether written by my own hand or not, and are offered to the company together with those contained in the declaration to the Home Life Insurance Company's medical examiner, as a consideration for, and as the basis of the contract with said company under any policy issued under this application.

I hereby agree on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application as follows:

1st. That the company shall incur no liability under this application until it has been received, approved, and a policy issued thereon, and delivered during my life and continuance in good health, and until the full premium has been duly paid to and accepted by the company or its authorized agent, except that when the premium has been paid in advance to an authorized agent of the company and a conditional receipt on the company's authorized form has been given by such agent, the liability of the company shall be as stated in such conditional receipt.

2nd. That the contract contained in such policy and in this application, is a contract made and completed in the State of New York and to be construed by the laws thereof.

3rd. That in any distribution of surplus, the principles and methods which may then be in use by the company for such distribution, and its determination of the amount apportioned to any policy which may be issued under this application shall be and are hereby ratified and accepted.

4th. That in consideration of the provisions made in this policy as to paid-up insurance, all rights and claim to any other surrender value than that so provided, whether provided by the statute of any State or not, is hereby relinquished.

5th. That in case of understatement of age, the amount payable shall be the insurance which the actual premium paid would have purchased at the true age of the insured.

6th. That no suit shall be brought against this company after two years from the time that the cause of such action shall have arisen.

7th. That for two years after the date of issue of the policy, engagement in any of the following occupations or employments, namely, blasting, mining, underground or submarine labor, the manufacture or handling in connection therewith or transportation of inflammable or explosive substances, employment requiring work on electric dynamos, or on live electric wires, service upon
11 any railroad train, or in switching or coupling cars, or on any steamboat or other vessel, without the written assent of the president, vice-president or secretary of the company will render the policy void; and self-destruction while sane or insane or death in consequence of a duel or criminal violation of law within two years after the date of issue of the policy will also render the policy void.

8th. That during the continuance of the policy I will not engage in military or naval service in time of war, unless the written permission of the president, vice-president or secretary of the company has been previously obtained. In case of death from service in war without such permission, the liability of the company shall not exceed the net reserve of the policy computed according to the combined experience table of mortality with interest at four per centum per annum.

Remarks: ——.

Dated at Pensacola this 22 day of August, 1899.

(S'g'd) ALEXANDER SUTER MACLEAN.

Signature of the person whose life is to be insured.

Endorsed upon the back of policy is the following:

Date, Aug. 28th, 1899. Kind of policy ——. Life 20 pay'ts. Dividend end't period 20 years. Age 34. Premium $45.20. Payable quarterly.

Also: Number 91540. The Home Life Insurance Co. Alex. S. Maclean. $5,000.

Endorsements. A. A. Fisher, executor *vs.* Home Life Insurance Company. Declaration. Filed December 30th, 1899. F. W. Marsh, clerk.

12 And afterwards, to wit: on the 1st day of Jan., A. D. 1900, the defendant herein, by its attorneys, Blount & Blount, filed its appearance herein, which was in the words and figures following, to wit:

In U. S. Circuit Court, State of Florida.

A. A. Fisher, as Ex'r,
vs.
Home Life Insurance Co.

The clerk—judge—of said court will please enter our appearance for defendant.

BLOUNT & BLOUNT,
Attorneys for Defendant.

Endorsed: Filed January 1st, 1900. F. W. Marsh, clerk.

And afterwards, to wit: on the 8th day of May, 1900, the plaintiff, by his attorneys, filed an amendment to his declaration herein, which was in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Florida, at Pensacola.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY.

Plaintiff amends his declaration by inserting therein, after the words "marked Exhibit 'A' and made a part hereof," the following:

And a copy of the written declaration made by plaintiff's testator to the medical examiner of the defendant at the time of the making of the said application, and said medical examiner's report is hereto annexed, marked Exhibit "B" and made a part hereof.

TUNISON & LOFTIN &
JNO. C. AVERY,
Pl'ff's Att'y.

13 *Declaration Made to the Medical Examiner of the Home Life Insurance Company.*

The applicant's declarations in answer to the following questions must be recorded by the examiner in his own handwriting:

1. A. Has any proposal or application to insure your life ever been made to any company, or agent, upon which a policy has not been issued as applied for? If so, when and to what company? Give particulars. A. No.

B. Has your life ever been insured in this company? If so, for how much, and what is amount of such insurance now in force? B. No.

C. Is your life insured elsewhere? If so, where, for how much and under what kinds of policies? C. ——.

D. Is any negotiation for other insurance pending, or contemplated? D. New York Life.

E. How much insurance are you now applying for to this company? E. $5,000.

2. Are you in perfect health, so far as you know and believe? Yes.

3. Has any physician ever given an unfavorable opinion on your life? No.

4. Has there been any marked change in your weight in recent years? If so, state particulars. No.

5. Have you ever been a pensioner? If so, state disability. No.

6. A. Have you ever had, or been subject to, frequent or severe headaches? No.

Fits or convulsions? No.
Loss of consciousness? No.
Paralysis of any sort? No.
Mental derangement? No.
Neuralgia? No.

Any nervous or muscular trouble? No.
Spinal disease? No.
Impairment of sight, or hearing? No.
Discharge from the ear? No.
Asthma? No.
Spitting or coughing of blood? No.
Chronic hoarseness? No.
Chronic cough? No.
Pleurisy or pneumonia? No.
Difficulty of breathing? No.
Fainting spells? No.
Palpitation of heart? No.
Pain in region of heart? No.
Dyspepsia? No.
Chronic diarrhœa or dysentery? No.
14 Piles, or varicose veins? Yes.
Fistula? No.
Jaundice? No.
Hepatic, or renal, colic, No.
Gravel, or calculus? No.
Painful, frequent, or difficult urination? No.
Dropsy? No.
Syphilis? No.
Cancer, or other tumor? No.
Scrofula? No.
Malaria? No.
Articular rheumatism? No.
a. How many attacks? ——.
b. Date and duration? ——.
c. What parts affected, ——.
Gout, No.
Sunstroke? No.
Yellow fever? No.

B. Have you had any serious illness, disease, or injury, not named above? If, so, give particulars.

NOTE.—Answer each question; when an affirmative answer is made, give full particulars as to date, duration, severity, frequency, etc.

Applicant had an attack of typhoid fever in 1888. Was ill about three weeks and made a prompt and complete recovery. The veins in Mr. Maclean's left leg (calf) are varicose, a condition of things which he says has existed since childhood. It has never given him the least trouble, or even discomfort of any kind. In fact otherwise the circulation is perfectly normal so far as I can determine.

7. Has any change of climate for your health ever been made, or advised? No.

8. A. Are you ruptured? No.
B. Is a truss worn? No.

9. Have you been successfully vaccinated? A. Yes.
Have you had small-pox? B. No.

10. A. What is the name and residence of your physician? A. Have none.

B. When, and for what, have his services been sought? B. Not in yrs.

11. A. What other physician have you consulted? A. Dr. W. H. Ross.

B. When, and for what? B. Typhoid fever in 1888.

12. Family record.

NOTE.—In giving the causes of death, avoid all indefinite terms, such as "exposure," "general debility," "effects of cold," "fever," "complication of diseases," etc. If the word "childbirth" be used, state how long after delivery death occurred, and whether there were any evidences of disease of the lungs. If the health of any of the living members is rated as "fair," or "poor," state the nature of the ill-health.

Living.			Dead.		
	Age.	Condition of health.	Age.	Cause of death.	How long ill.
Father			75	Do not know...	Short time.
Mother			72	" " " ...	" "
15 3 brothers	32	Good			
	36	"	40	Malarial fever..	4 or 5 weeks.
None sisters					
Father's father			Over 80	Do not know...	Do not know.
Father's mother			" 70	" " " ...	" " "
Mother's father			About 65	" " " ...	" " "
Mother's mother			60	" " " ...	" " "

Previous health of father? Good.
" " " mother? Good.
" " " brother? Good.
" " " father's father? Do not know.
" " " father's mother? " " "
" " " mother's father? " " "
" " " mother's mother? " " "

13. Has there ever been in your family, among your parents, brothers, sisters, uncles or aunts, any consumption, scrofula, cancer, epile-sy, insanity, rheumatism or gout? If so, state particulars. No.

14. A. Do you drink wine, spirits, or malt liquors, daily or habitually? A. No habit of drinking liquors.

B. If so, which of these, and to what extent daily? B. ——.

NOTE.—State the daily amount. General terms, such as temperately, "moderately," "occasionally," will not be accepted, and will necessitate correspondence.

C. Have you ever used them freely or to excess? C. No.

D. Have you ever used opium, morphine, chloral, cocaine, or other narcotic? If so, which of them, and to what extent? D. No.

E. Have you ever had special treatment for the alcohol habit, the cocaine or morphine habit? E. No.

F. To what extent do you use tobacco? F. Smoke once or twice daily, pipe.

15. A. How long have you been engaged in your present occupation? A. 7 or 8 years.

B. What other occupations have you had? B. Book-keeper.

C. Is any change in occupation contemplated? If so, state particulars? C. No.

D. Have you ever been engaged in any way in the sale or manufacture of alcoholic beverages? D. No.

E. Are you employed where liquors are sold? E. No.

16. A. Where have you resided, summer and winter, during each of the last ten years? Name States or countries. A. Florida.

B. Do you contemplate a change of residence, either temporary or permanent? If so, state particulars. B. No.

I hereby declare that the accompanying application to the Home Life Insurance Company for an insurance on my life, dated Aug. 24th, 1899, was signed by me, and that I renew my agreement therein; and I also agree to waive all provisions of law forbidding any physician or surgeon from disclosing any information acquired while attending me in a professional capacity.

A. S. MACLEAN.

Signature of the applicant.

16 *Medical Examiner's Report.*

1. A. Full name of the person examined, A. S. Maclean.

B. Residence, Pensacola, Fla.

C. Occupation, journalist.

D. Age, 34.

E. Race, white.

F. Is he married? No.

G. Is the risk affected unfavorably by anything in his occupation or residence? No.

H. How long have you known him? 8 years.

I. Are you related to him? No.

2. A. Exact weight (coat and vest off). 148 lbs.

NOTE.—If the weight approximates the maximum or minimum of the tables, weigh him and take his height; do not accept his statement.

B. Exact height (in shoes), 5 feet 10½ inches.

C. Girth of chest (under vest), full inspiration 36 in.; deep expiration, 32½ in.

D. Girth of abdomen (at waist-band of trousers), 32 inches.

E. Did you weigh and measure him? No.

F. Which parent does he resemble physically? Mother.
G. Is overweight, or underweight, a family trait? No.
H. Is there anything unfavorable in his general appearance? No.
I. Does his facial aspect indicate health and vigor? Yes.
J. Figure? State whether it is erect or stooping. Erect.
K. Does he seem to you older than the stated age? No.
L. Color of hair? Black.
M. Color of eyes? Gray.
N. Has he any physical defects or deformities? If so, from what cause? ——.
O. Has he any marks of identification? What caused them? No.

3. A. Has he the appearance of a person addicted to the use of stimulants? A. No.
B. Have you any reason to suspect that he has ever used narcotics, or that he has led other than a sober and temperate life? No.

4. Is there any skin eruption, or are there any sores or ulcers, on any part of his body? No.

5. A. Is the respiratory murmur clear and distinct over the lungs? A. Yes.
B. Do auscultation and percussion show an entire absence of any signs of past or present disease of the respiratory organs? B. Yes.

6. A. State the rate and other qualities of the pulse? If the rate is above 90, or below 60, re-examine another day. A. Seventy-eight normal.

NOTE.—The rate of pulse must be written out in words.

B. Is it irregular, or intermittent? B. No.

7. A. Are the sounds and rhythm of the heart regular and normal? A. Yes.
B. Is there any evidence of undue strength or weakness of heart action? B. No.
C. Are there any indications of disease of the heart or blood-vessels? C. No.
D. Is the apex-beat in the usual place? D. Yes.

NOTE.—Examine the heart against the naked skin and with the stethoscope.

8. Is there any evidence of derangement of functions of the stomach, or other abdominal organs? No.

17 9. A. Is there any indication of enlarged prostate, stricture, or other disease of the urinary organs? No.
B. Is it necessary for him to rise at night to urinate? No.

10. Report on examination of the urine.

NOTE *a*.—The examiner must have personal knowledge that the urine examined is authentic.
NOTE *b*.—A microscopical examination is not required, except as

called for by the rules of the company, or unless deemed advisable for the particular case.

A. Specific gravity, 1,020. Reaction, acid. Amount of albumen, none. Test used, heat. Amount of sugar, none. Test used, ——.

B. Microscopical examination.

NOTE c.—The test for sugar is to be made in every case.

C. Is the urine clear or turbid? Clear, no deposit.

D. Do you know that the urine examined was voided by the applicant? Yes.

11. If the person examined is a woman, answer the following questions. A. What is the occupation of her husband? B. What is the date of her marriage? E. Has she ever had any disease of the uterus or its appendages, any menstrual disorder, or any disease of the breast? C. How many children has she borne, and what is the date of the last confinement? D. Is she now pregnant? F. Has she passed the change of life? G. Has she ever had any miscarriage, or serious difficulty in labor?

12. Where was this examination made, at the applicant's residence, or place of business, or at the examiner's office? Examiner's office.

13. Was there present at the examination any person other than the applicant and the examiner? No.

14. Do you think it advisable to seek for any further information concerning the applicant, from his medical adviser, or from any other source? No.

15. A. Have you reviewed the answers as set down on the two sides of this sheet, to make sure that the same are correct? And that every question has some answer? Please see that all erasures and corrections are properly initialed. A. Yes.

B. Have you examined the accompanying application, and verified the statements therein recorded? Please see that the signatures to the application and the declarations are alike, and that the date of the application is inserted in the place provided for it on the other side of this sheet. B. Yes.

NOTE.—If from any feeling of delicacy you have omitted to mention any circumstances affecting the risk, such as questionable habits, peculiar family relations, pecuniary embarrassments, etc., write immediately, direct to the medical director, 256 Broadway, New York. Such letter will be held in strict confidence.

16. Is there anything in the applicant's personal or family history, habits, occupation, or residence, so far as you know or believe, tending to shorten his life, or that is detrimental to the risk? If so, state in what particular. A. Personal history? No. B. Family history? No. C. Physical condition? No. D. Mental condition? No. E. Habits, past or present? No. F. Occupation, past or present? No. G. Residence? No. H. Environment? No.

18 17. Do you unqualifiedly recommend the risk proposed, If you do not, state reasons. Yes, with the exception noted below.

Additional Remarks.

Applicant says the varicose veins referred to above *has* never been inflamed or irritated in the slightest degree, and have always remained exactly the same as far back as he can remember. Otherwise than this, the enlarged veins, his condition is exceptionally good, as you will see from the foregoing report.

I hereby certify that I have examined, in private, Mr. A. S. Maclean, at Pensacola, Fla., this 24 day of Aug., 1899; that I have carefully considered all of the statements made to me by him in connection with his accompanying application for insurance and my examination; that his answers to the questions in the declarations and the answers in medical report are in my own handwriting, and that the declarations and agreement on the other side of this sheet were signed by him in my presence.

J. Z. CRAVEY, M. D., *Examiner.*

P. O. address, Pensacola, Fla.

N. B.—If you are not an appointed examiner for the company, fill up the following form: A. From what college did you receive your medical degree? ——. B. How long have you practiced medicine? ——. D. Name other companies for which you have examined. ——. E. References: Dr. —— of ——. C. How long have you lived in your present locality? ——.

Immediately on completion of the examination you may, if you deem it desirable, mail this paper to the medical director, at the home office in New York. You must always do so, without showing the paper to any one, if the person examined so requests. The application is to be returned to the agent.

Decision of the Medical Director of the Company.

Approved Aug. 31, 1899.

F. W. CHAPIN,
Med. Director.

Endorsements: Amendment of declaration. Filed May 8, 1900. F. W. Marsh, clerk.

And afterwards, to wit; on the 28th day of January, 1901, the defendant in the above-entitled cause, by its attorneys, came into court and filed the following pleas, to wit;

In the United States Circuit Court, Northern District of Florida, at Pensacola.

A. A. FISHER, as Executor of the Estate of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY.

19 The defendant, withdrawing all former pleas, pleads as follows:

1. That, the defendant required of the said Alexander Suter

Maclean, that he should, prior to, and as a condition of the issuance of the policy of insurance sued upon, make and sign an application to this defendant for the issuance of the said policy: That he did make, sign and deliver to the defendant such application and offered therein the statements and answers in it contained, as a consideration for, and as a basis of, a contract with the defendant, under any policy issued upon said application. A copy of said application is annexed to the declaration: That, by the terms of the policy of insurance sued on, the said application became a part of the said contract of insurance: That, in and by said application, the said Alexander Suter Maclean warranted on behalf of himself or of any person who should have or claim any interest in any policy issued under the said application, that the statements and answers in said application were true, full and complete; that in answer to question "9*a*" in said application, to wit:

"9*a*." "Do you drink wines, spirits or malt liquors?" he answered: "Yes."

And in answer to question "9*b*" in said application, to wit:

"9*b*. If so, which of these, and to what extent?" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made said answer, he had a habit of drinking spirits more than moderately:

2. That, in the application mentioned in the first plea containing the warranty therein mentioned, the said Alexander S. Maclean was asked questions numbered 9*a* and 9*c*, to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered: "Yes." And to the question "9*c*" he answered: "No."

20 The defendant avers that the said answer to the said question "9*c*" was not true, full and complete because, prior to the making of said answer, he had a habit of using spirits freely:

3. That, in the application mentioned in the first plea containing the warranty therein mentioned, the said Alexander S. Maclean was asked questions numbered "9*a*" and "9*c*," to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered: "Yes." And to the question "9*c*" he answered: "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because, prior to the making of the said answer, he had a habit of using spirits to excess;

4. That, the defendant required of the said Alexander S. Maclean that he should, prior to, and as a condition of, the issuance of the policy of insurance sued upon, make and sign an application to this defendant for the issuance of the said policy: That he did make, sign and deliver to the defendant such application, and offered therein the statements and answers in it contained as a consideration for and as the basis of the contract with the defendant under any policy issued under the said application. A copy of said ap-

plication is annexed to the declaration. That by the terms of the policy of insurance sued on, the said application became a part of the said contract of insurance: That in and by said application the said Alexander S. Maclean represented that the statements and answers in said application were true, full and complete: That in answer to question "9*a*" in said application, to wit;

"9*a*. Do you drink wines, spirits or malt liquors?" he answered: "Yes." And in answer to question "9*b*" in said application, to wit:

"9*b*." If so, which of these, and to what extent? he answered: "Moderately."

21 The defendant avers that the said answer was not true, full and complete, because at the time that he made said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant, upon the life of the said Alexander S. Maclean:

5. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked questions numbered "9*a*" and "9*c*," to wit;

"9*a*. Do you drink wines, spirits, or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered: "Yes." And to the question "9*c*" he answered: "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because, prior to the making of said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant, upon the life of the said Alexander S. Maclean;

6. That, in the application mentioned in the fourth plea containing the representation therein mentioned the said Alexander S. Maclean was asked questions numbered "9*a*" and "9*c*," to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered: "Yes." And to the question "9*c*" he answered: "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to the making of the said answer, he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by defendant, upon the life of the said Alexander S. Maclean:

22 7. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked questions "9*a*" and questions "9*b*," to wit:

"9*a*. Do you drink wine, spirits or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or not issue the policy of insurance upon the life of the said Alexander S. Maclean:

8. That, in the application mentioned in the fourth plea containing the representation mentioned, the said Alexander S. Maclean was asked question "9*a*" and question "9*b*," to wit:

"9*a*. Do you drink wine, spirits or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made said answer, he had a habit of drinking spirits, more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the life of the said Alexander S. Maclean.

23 9. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked question "9*a*" and question "9*b*," to wit:

"9*a*. Do you drink wine, spirits or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean;

10. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked question "9*a*" and question "9*b*," to wit;

"9*a*. Do you drink wine, spirits or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk as-

sumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or not issue the policy of insurance upon the life of the said Alexander S. Maclean:

And defendant avers that at the time of making the said application the said Maclean knew that he had a habit of drinking spirits more than moderately:

24 11. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked question "9*a*" and question "9*b*," to wit:

"9*a*. Do you drink wine, spirits, or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the life of the said Alexander S. Maclean:

And defendant avers that at the time of making the said application the said Maclean knew that he had a habit of drinking spirits more than moderately:

12. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked question "9*a*" and question "9*b*," to wit:

"9*a*. Do you drink wine, spirits, or malt liquors?"

"9*b*. If so, which of these, and to what extent?"

To the question "9*a*" he answered: "Yes." And to the question "9*b*" he answered: "Moderately."

The defendant avers that the said answer was not true, full and complete, because, at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S.

25 Maclean, because the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean:

And defendant avers that at the time of making the said application, the said Maclean knew that he had a habit of drinking spirits more than moderately.

13. That, at the time of the making of the said application, the said Alexander S. Maclean made to the medical examiner of the defendant, certain statements and answers which are contained in the written declarations made by him to the said examiner, a copy of which declaration is attached to the amended declaration.

That one of the questions in said declaration was as follows, to wit:

"14*a*. Do you drink wines, spirits or malt liquors daily or 'habitually?'"

To this question the said Alexander S. Maclean answered: "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said Alexander S. Maclean did have at the time of making the same, a habit of drinking liquors, to wit: spirits; and that, the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean.

14. That, at the time of the making of the said application the said Alexander S. Maclean made to the medical examiner of the defendant, certain statements and answers which are contained in the written declarations made by him to the said examiner, a copy of which declaration is attached to the amended declaration.

That one of the questions in said declaration was as follows, to wit:

14*a*. "Do you drink wines, spirits or malt liquors daily or 'habitually?'"

26 To this question the said Alexander S. Maclean answered: "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said Alexander S. Maclean did have at the time of making the same, a habit of drinking liquors, to wit: spirits; and that, the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean; because a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the life of the said Alexander S. Maclean.

15. That, at the time of the application (a copy of which is attached to the declaration) the said Alexander S. Maclean had a habit of drinking spirits to excess; that said habit was material to the risk to be assumed by defendant, because a knowledge of the existence of such habit would have materially influenced the judgment of the defendant in determining whether it would or not issue such policy of insurance upon the life of the said Maclean; that the said Maclean knew of the existence of the said habit and believed the same to be material to the said risk, but fraudulently withheld the knowledge of such fact from the defendant.

16. That, at the time of the application (a copy of which is attached to the declaration) the said A. S. Maclean had a habit of drinking spirits to excess; that said habit was material to the risk to be assumed by defendant, because the existence of such habit would tend to injure the health and shorten the life of the said A. S. Maclean; that the said Maclean knew of the existence of the said habit and believed the same to be material to the said risk, but fraudulently withheld the knowledge of such fact from the defendant.

BLOUNT & BLOUNT,
Attorneys for Defendant.

27 J. J. Hooton, being duly sworn, says that he is the agent for the defendant, and that the foregoing pleas are true.

J. J. HOOTON.

Sworn to and subscribed before me this 26th day of January, A. D. 1901.

SAM'L C. PINNEY,
[SEAL.] *Notary Public.*

Endorsed: Filed January 28th, 1901.

And afterwards, to wit: on the first day of February, 1901, the plaintiff, by his attorneys, filed in the said court his demurrer to the substituted pleas, which was in the words and figures following, to wit:

In United States Circuit Court, Northern District of Florida, at Pensacola.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter McLean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY.

And now comes the said plaintiff, by his attorneys, and demurs to the substituted pleas filed by defendant, to wit:

1.

Plaintiff demurs to the first of said pleas because the same is bad in substance, and assigns the following grounds of demurrer:

1. Said plea does not, when taken with the admitted allegations of the declaration, show a warranty.

2. It appears that plaintiff's testator stated his estimate of his own habits, and that defendant waived any further disclosure touching the same.

3. It appears that defendant left the matter inquired about to be answered according to plaintiff's testator's opinion, and it does not appear that said testator did not state his honest opinion.

4. It does not appear that defendant in issuing said policy relied upon the answers of said testator to said questions.

5. It appears that in issuing said policy the defendant did not rely upon the answers of said testator to said questions.

28 6. It appears that the said defendant is estopped from making the said defense, because it appears that the said testator was advised by defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy; but yet that the policy was issued by defendant and premiums therefor received by it from said testator; and, hence, defendant will not be permitted to avoid its liability upon said policy upon the ground that said answers were untrue, without alleging that said testator was informed that the policy was issued on the faith of said answers.

7. Said plea is otherwise bad and insufficient in law.

2.

Plaintiff demurs to the second of said pleas upon the same grounds.

3.

Plaintiff demurs to the third of said pleas upon the same grounds.

4.

Plaintiff demurs to the fourth of said pleas upon the same grounds.

5.

Plaintiff demurs to the fifth of said pleas upon the same grounds.

6.

Plaintiff demurs to the sixth of said pleas upon the same grounds.

7.

Plaintiff demurs to the seventh of said pleas upon the same grounds.

8.

Plaintiff demurs to the eighth of said pleas upon the same grounds.

9.

Plaintiff demurs to the ninth of said pleas upon the same grounds.

10.

Plaintiff demurs to the tenth of said pleas upon the same grounds.

29 11.

Plaintiff demurs to the eleventh of said pleas upon the same grounds.

12.

Plaintiff demurs to the twelfth of said pleas upon the same grounds.

13.

Plaintiff demurs to the thirteenth of said pleas upon the same grounds.

14.

Plaintiff demurs to the fourteenth of said pleas upon the same grounds.

15.

Plaintiff demurs to the fifteenth of said pleas upon the same grounds.

TUNISON & LOFTIN &
JNO. C. AVERY,
Plaintiff's Attorneys.

I certify that in my opinion the foregoing demurrers are well founded in point of law, and make oath that the same are not interposed for the purpose of delay.

JNO. C. AVERY.

Sworn to and subscribed before me this 1st day of February, A. D. 1901.

E. R. BURGOYNE,
[SEAL.] *Notary Public.*

Endorsed: Filed February 1st, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the twenty-eighth day of February, 1901, the court made and caused to be entered of record the following order in the above-entitled cause, to wit:

In the United States Circuit Court, Northern District of Florida, at Pensacola.

30 A. A. FISHER, as Executor of the Estate of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY.

The demurrers of the plaintiff, filed on February 1st, 1901, to the pleas of the defendant, filed on January 28th, 1901, having been brought on for argument and considered by the court: it is now ordered and adjudged that the demurrers, numbered from one to fifteen, inclusive, be and the same are hereby sustained.

It is further ordered that the demurrer of the plaintiff filed on February 13th, 1901, to the sixteenth plea of the defendant, be and the same is hereby overruled.

Ordered and done this 28th day of February, A. D. 1901.

CHAS. SWAYNE, *Judge.*

Endorsed: Filed February 28th, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the fifth day of March, 1901, the defendant, by its attorneys, came into court and filed additional pleas in the foregoing cause, which pleas were in the words and figures following to wit:

In United States Circuit Court, Northern District of Florida, at Pensacola.

A. A. FISHER, as Executor of the Estate of Alexander S. Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY.

The defendant, for further pleas, says:

17. That in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked questions "9a" and "9c," to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

31 To the question "9*a*" he answered "Yes," and to the question "9*c*" he answered "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to and at the time of the making of said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean; and that the defendant was induced by the said answer of the said Maclean, to issue the said policy:

18. That in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander S. Maclean was asked questions "9*a*" and "9*c*," to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered "Yes," and to the question "9*c*" he answered "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to and at the time of making of said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean; and that the defendant was induced by the said answer of the said Maclean, to issue the said policy; and that, at the time of making the said answer, the said Maclean knew of the existence of the said habit, and believed the same to be material to the said risk:

19. That, in the application mentioned in the fourth plea containing the representations therein mentioned, the said Alexander S. Maclean was asked questions numbered "9*a*" and "9*c*," to wit:

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

32 To the question "9*a*" he answered, "Yes," and to the question "9*c*" he answered "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to and at the time of the making of said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean: that a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life; that a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life; that the existence of such habit tended to injure the health, and shorten the life of the said Alexander S. Maclean, and that the defendant was induced by the said answer of the said Maclean to issue the said policy:

26. That, in the application mentioned in the fourth plea con-

taining the representation therein mentioned, the said Alexander S. Maclean was asked questions numbered "9*a*" and "9*c*," to wit;

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered "Yes," and to the question "9*c*" he answered "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to and at the time of the making of said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean: that a knowledge of such exist-
33 ence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life: that a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life: that the existence of such habit tended to injure the health, and shorten the life of the said Alexander S. Maclean: that the said Maclean knew, at the time of making the said answer, of the existence of the said habit, and believed the same to be material to the said risk, and that the defendant was induced by the said answer of the said Maclean, to issue the said policy.

BLOUNT & BLOUNT,
Attorneys for Defendant.

Thos. C. Watson, being duly sworn, says, that he is the agent of the defendant, and that the foregoing pleas are true.

THOS. C. WATSON.

Sworn to and subscribed before me this 4th day of March, A. D. 1901.

AUBREY MAURA,
[SEAL.] *Notary Public.*

Endorsed: Filed March 5th, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the thirteenth day of March, 1901, the plaintiff, by his attorneys, filed his replication to the 16th additional plea of the defendant, which was in the words and figures following, to wit;

In the Circuit Court of the United States, Northern District of Florida.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE CO.

34 The said plaintiff, by his attorneys, for further replication to the 16th additional plea, says:

6. That the said A. S. McLean was in the said application, after the question, "9*a*. Do you drink wines, spirits, or malt liquors," to which he had answered "Yes," asked the question, "9*b*. If so, which of these, and to what extent?" to which he answered "Moderately;" that thereafter the defendant required him to go before one J. Z. Cravey, the defendant's medical examiner, at Pensacola, and answer certain other questions by means of a printed form of declaration, a copy of which is attached to and made a part of the amendment of the declaration, which said declaration is entitled in words and figures following: "Declaration made to the medical examiner of the Home Life Insurance Company," under which designation the defendant stated to the applicant as follows: "The applicant's declaration in answer to the following questions must be recorded by the examiner in his own handwriting;" that in said declaration the said A. S. McLean was asked the question, "14*a*. Do you drink wine, spirits or malt liquors daily or habitually?" to which question he answered "No habit of drinking liquor." That immediately following he was asked the question, "14*b*.—If so, which of these and to what extent daily?" to which he made no answer at all, and no answer was thereto recorded by the said medical examiner, who placed after the said question a simple dash of ink, notwithstanding that immediately following the said question was printed in italics, the following: "Note—State the daily amount. General terms, such as 'temperately,' 'moderately,' 'occasionally,' will not be accepted and will necessitate correspondence." That at the foot of the said declaration, and preceding the signature of the said A. S. McLean, the defendant required him to declare, and accepted his declaration as follows: "I hereby declare that the accompanying application to the Home Life Insurance Company on my life, dated August 24, 1899, was signed by me, and that I renew my agreement therein. And I also agree

35 to waive all provisions of law forbidding any physician or surgeon from disclosing any information acquired while attending me in a professional capacity," the "application" therein referred to being the same as that whereof a copy is attached and made a part of the declaration in this case; that said A. S. McLean by reason of the premises, understood that the defendant would not issue the policy for which he applied, upon the said declaration to the defendant's medical examiner, defective as aforesaid, but that defendant would seek other information touching the matters inquired about but not answered by him as required by the defend-

ant; and the said A. S. McLean believed that the said policy was issued to him without the defendant being induced to issue the same by the defective answers aforesaid, but upon information otherwise obtained by defendant and necessitated by the fact that said McLean did not consent to answer as required by defendant; and so understanding, the said McLean accepted the said policy and paid the premiums as stated in the declaration.

TUNISON & LOFTIN &
JNO. C. AVERY.
Pl'ff's Att'ys.

In the Circuit Court of the United States, Northern District of Florida.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter McLean, Deceased,
vs.
THE HOME LIFE INSURANCE CO.

And, for a further replication to the 16th additional plea, the plaintiff, by his attorneys, says:

7. That, the said A. S. McLean was in the said application, after the question, "9*a*. Do you drink wines, spirits or malt liquors?" to which he had answered "Yes," asked the question, "9*b*. If so,
36 which of these, and to what extent?" to which he answered "Moderately;" that thereafter the defendant required him to go before one J. Z. Cravey, the defendant's medical examiner, at Pensacola, and answer certain other questions by means of a printed form of declaration, a copy of which is attached to and made a part of the amendment of the declaration herein, which said declaration to the medical examiner is entitled in words and figures following: "Declaration made to the medical examiner of the Home Life Insurance Company," under which designation the defendant stated to the applicant as follows: "The applicant's declaration in answer to the following questions must be recorded by the examiner in his own handwriting;" that in said declaration the said A. S. McLean was asked the question: "14*a*. Do you drink wine, spirits or malt liquors daily or habitually?" to which question he answered, "No habit of drinking liquor." That immediately following he was asked the question, "14*b*. If so, which of these and to what extent daily?" to which he made no answer at all, and no answer was thereto recorded by the said medical examiner, who placed after the said question a simple dash of ink, notwithstanding that immediately following the said question was printed in italics, the following: "Note—State the daily amount. General terms, such as 'temperately,' 'moderately,' 'occasionally,' will not be accepted and will necessitate correspondence." That at the foot of the said declaration, and preceding the signature of the said A. S. McLean, the defendant required him to declare, and accepted his declaration, as follows: "I hereby declare that the accompanying application to the Home Life Insurance Company on my life, dated August 24, 1899,

was signed by me, and that I renew my agreement therein. And I also agree to waive all provisions of law forbidding any physician or surgeon from disclosing any information acquired while attending me in a professional capacity," the "application" therein referred to being the same as that whereof a copy is attached and made a part of the declaration in this case: that said A. S. McLean by reason of the
37 premises, understood that the defendant would not issue the policy for which he applied upon the said declaration to the defendant's medical examiner, defective as aforesaid, but that defendant would seek other information touching the matters inquired about but not answered by him as required by the defendant. And the said plaintiff in fact avers that the said defendant did thereafter, and before the issuance of the said policy, prosecute an investigation or investigations at Pensacola for the purpose of ascertaining whether defendant should issue the said policy, and did, by means of such investigation or investigations obtain information upon which, in connection with the report of its medical examiner at Pensacola, aforesaid, the said policy was issued.

TUNISON & LOFTIN &
JNO. C. AVERY,
Att'ys for Pl'ff.

Endorsed: Filed March 13th, 1901. F. W. Marsh, clerk.

And afterwards. to wit: on the 29th day of March 1901, the plaintiff in the above-entitled cause, came into court, by his attorneys, and filed the following replications to the several pleas of the defendant herein, to wit:

In the Circuit Court of the United States, Northern District of Florida.

A. A. FISHER, as Executor of the Last Will and Testament of A. S. Maclean,
vs.
HOME LIFE INSURANCE COMPANY.

The plaintiff withdraws all replications heretofore filed to pleas, and for replications to the several pleas of the defendant not hitherto disposed of, plaintiff says:

As to the 16th plea:

1. That he joins issue upon the said plea;

2. That the defendant was not induced to issue the said policy upon representations made by said Maclean in the said application;

38 3. That the defendant informed the said A. S. Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that if the said policy was issued, as applied for, it would be issued

upon information acquired by the defendant of persons and sources other than the said Maclean; that therefore, the said Maclean understood, and had reason to understand, that the policy which was delivered to him and which is the same policy sued on in this case, was not based upon any statement or representation made by him either in the said application or the said declaration to the medical examiner, or otherwise, and so believing, he accepted said policy and paid premiums, as stated in the declaration;

4. That said Maclean had no knowledge of said alleged habit;

5. That said Maclean was not conscious of the existence of the said alleged habit.

As to the 17th plea:

1. That he joins issue upon the said plea;

2. That the defendant informed the said Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean; that, therefore, the said Maclean understood, and had reason to understand, that the policy which was delivered to him, and which is the same policy sued on in this case, was not based upon any statement or representation made by him
39 either in the said application or the said declaration to the medical examiner, or otherwise, and so believing, he accepted said policy and paid premiums, as stated in the declaration;

3. That the said Maclean had no habit of using spirits freely at the time of making said answer;

4. That the said Maclean had no knowledge of the existence of such alleged habit;

5. That said Maclean was not conscious of the existence of the said alleged habit.

As to the 18th plea:

1. That he joins issue upon the said plea;

2. That the defendant informed the said A. S. Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean; that, therefore, the said Maclean understood, and has reason to understand, that the policy which was delivered to him and which is the same policy sued on in this case, was not based upon any statement or representation made by him either in the said application or the said declaration to the medical examiner, or otherwise, and so believing, he accepted said policy and paid premiums, as stated in the declaration;

3. That it is not true that the said Maclean believed that he had

a habit of drinking spirits to such extent as to make the same material to the said risk;

4. That said Maclean had no habit of using spirits freely at the time of making said answer;

5. That said Maclean had no knowledge of the existence of such alleged habit;

40 6. That said Maclean was not conscious of the existence of such alleged habit.

As to the 19th plea:

1. That he joins issue upon the said plea;

2. That the defendant informed the said Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean; that, therefore, the said Maclean understood, and had reason to understand, that the policy which was delivered to him, and which is the same policy sued on in this case, was not based upon any statement or representation made by him either in the said application or the said declaration to the medical examiner, or otherwise, and so believing, he accepted said policy and paid premiums, as stated in the declaration;

3. That said Maclean had no habit of using spirits freely at the time of making said answer;

4. That said Maclean had no knowledge of the existence of such alleged habit;

5. That the said Maclean was not conscious of the existence of such alleged habit.

As to the 20th plea:

1. That he joins issue upon the said plea;

2. That the defendant informed the said Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is at-

41 tached to the amendment to the declaration in this case; but that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean; that, therefore, the said Maclean understood, and had reason to understand, that the policy which was delivered to him, and which is the same policy sued on in this case, was not based upon any statement or representation made by him either in the said application or the said declaration to the medical examiner, or otherwise, and so believing, he accepted said policy and paid premiums, as stated in the declaration;

3. That the said Maclean had no habit of using spirits freely at the time of making said answer;

4. That said Maclean had no knowledge of the existence of such alleged habit.

5. That said Maclean was not conscious of the existence of the said alleged habit.

JNO. C. AVERY,
Att'ys for Pl'ff.

Endorsed: Filed March 29th, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the fourth day of April, 1901, the following pleas were filed by the defendant herein to the plaintiff's declaration, to wit:

In United States Circuit Court, Northern District of Florida.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY.

The defendant, for further pleas to the declaration, says:

21. That, in the application mentioned in the fourth plea, containing the representations therein mentioned, the said Alexander Suter Maclean was asked questions numbered "9*a*" and "9*c*," to wit:

42 "9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered "Yes," and to the question "9*c*," he answered, "No."

The defendant avers that the said answer to the said question was not true, full and complete, because, prior to, and at the time of making the said answer, he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander Suter Maclean, and that the defendant was induced by the said answer of the said Maclean, to issue the said policy;

22. That, in the application mentioned in the fourth plea containing the representation therein mentioned, the said Alexander Suter Maclean was asked questions numbered "9*a*" and "9*c*," to wit;

"9*a*. Do you drink wines, spirits or malt liquors?"

"9*c*. Have you ever used them freely or to excess?"

To the question "9*a*" he answered, "Yes," and to the question "9*c*," he answered "No."

The defendant avers that the said answer to the said question "9*c*" was not true, full and complete, because prior to, and at the time of the making of said answer, he has a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean; that a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue a policy of insurance upon the said life; that a knowledge of such existence would materially influence careful and intelligent life in-

surance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life; that the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean, and that the defendant was induced by the said answer of the said Maclean to issue the said policy.

BLOUNT & BLOUNT,
Attorneys for Defendant.

43 J. J. Hooten being duly sworn says that he is the agent of the defendant, and that the foregoing pleas are true.

J. J. HOOTON.

Sworn to and subscribed before me, this 4th day of April, A. D. 1901.

JAMES C. WATSON,
[SEAL.] *Notary Public.*

Endorsed: Filed April 4th, 1901. F. W. Marsh, clerk.

And thereafter, to wit: on the 16th day of April, 1901, the following replications were filed by the plaintiff herein, to the *the* pleas of the defendant numbered 21 and 22, to wit:

In the United States Circuit Court for the Northern District of Florida.

A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter Maclean,
vs.
HOME LIFE INSURANCE COMPANY.

Plaintiff, by his attorneys, for replications to the defendant's last plea numbered 21, says:

1. That he joins issue upon the said plea:

2. That the defendant informed the said A. S. Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that, if the said policy was issued as applied for, it would be issued upon information acquired by the defendant from persons and sources other than the said Maclean; that thereafter said Maclean understood and had reason to understand, that the policy which was delivered to him and which is the same policy sued on in this case, was not based upon any statement or representation made by

44 him, either in the said application, or in his said declaration to the medical examiner, or otherwise; and so believing, he accepted the said policy and paid premiums, as stated in the declaration.

3. That said Maclean had no knowledge of the said alleged habit;

4. That said Maclean was not conscious of the existence of the said alleged habit;

And for replication to defendant's last plea numbered 22, the plaintiff says:

1. That he joins issue upon the said plea:

2. That the defendant informed the said A. S. Maclean that it would not issue the said policy upon statements made by him in his said application, or upon statements made by him in his declaration to the defendant's medical examiner, a copy of which is attached to the amendment of the declaration in this case; but that, if the said policy was issued as applied for, it would be issued upon information acquired by the defendant from persons and sources other than the said Maclean; that thereafter said Maclean understood, and had reason to understand, that the policy which was delivered to him and which is the same policy sued on in this case, was not based upon any statement or representation made by him, either in the said application, or in his said declaration to the medical examiner, or otherwise; and so believing, he accepted the said policy and paid premiums, as stated in the declaration;

3. That said Maclean had no knowledge of the said alleged habit;

4. That said Maclean was not conscious of the existence of the said alleged habit.

TUNISON & LOFTIN &
JNO. C. AVERY,
Att'ys for Pl't'ff.

Endorsed: Filed April 16th, 1901. F. W. Marsh, Clerk.

And on the fourth day of April, 1901, the following demurrer was filed by the defendant in the said cause, to wit;

In Escambia County Circuit Court, State of Florida.

45 A. A. FISHER, as Executor of the Last Will and Testament of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE CO.

The defendant demurs to the third replication to the seventeenth plea, upon the ground that the said replication does not deny that the said Maclean had a habit of using spirits freely, prior to the time of making the answer therein mentioned;

The defendant demurs to the fourth replication to the seventeenth plea, upon the ground that a want of knowledge by the said Maclean of the existence of the said habit would not prevent his false representation under the circumstances mentioned in said plea from being a bar to a recovery in this suit.

The defendant demurs to the fifth replication to the seventeenth plea, upon the ground that the alleged fact that the said Maclean was not conscious of the existence of the habit mentioned in said

plea would not prevent the false representation alleged in said plea under the circumstances therein set forth, from avoiding the said policy and preventing a recovery in this suit:

Defendant demurs to the fourth replication to the eighteenth plea, upon the ground that it does not deny that the said Maclean had a habit of using spirits freely prior to the time of making the answer therein mentioned;

Defendant demurs to the third replication to the nineteenth plea, upon the ground that the said replication does not deny that the said Maclean had a habit of using spirits freely, prior to the time of making the answer therein mentioned:

46 Defendant demurs to the fourth replication to the nineteenth plea, upon the ground that a want of knowledge by the said Maclean of the existence of the said habit would not prevent his false representation under the circumstances mentioned in said plea from being a bar to a recovery in this suit:

Defendant demurs to the fifth replication to the nineteenth plea, upon the ground that the alleged fact that the said Maclean was not conscious of the existence of the habit mentioned in said plea would not prevent the false representation alleged in said plea under the circumstances therein set forth, from avoiding the said policy and preventing a recovery in this suit:

BLOUNT & BLOUNT,
Attorneys for Defendant.

I, William A. Blount, of counsel for defendant, certify that, in my opinion, the foregoing demurrer is well founded in law, and make oath that it is not interposed for delay.

W. A. BLOUNT.

Sworn to and subscribed before me this 4th day of April, A. D. 1901.

E. H. ROSENSTEIN,
Notary Public.

[SEAL.]

Endorsed: Filed April 4th, 1901. F. W. Marsh, clerk.

And on the fifteenth day of March, 1901, the following pleas were filed by the defendant in the said cause, to wit;

In United States Circuit Court, Northern District of Florida.

A. A. FISHER, as Executor,
vs.
HOME LIFE INSURANCE COMPANY OF NEW YORK.

The defendant, for further pleas to the declaration, says:

23. That, at the time of the making of the application (a copy of which is attached to the declaration,) the said Alexander S. Maclean made the medical examiner of the defendant certain

47 statements and answers which are contained in the written declaration made by him to the said examiner, a copy of

which declaration is attached to the amended declaration of the plaintiff: that, by said written declaration, and the application, and the policy, the said statements made by the said Maclean became and were warranties: that, one of the questions, in said declaration, was as follows, to wit:

"14*a*. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered: "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have, at the time of making the same a habit of drinking liquors, to wit, spirits:

24. That, at the time of the making of the application (a copy of which is attached to the declaration), the said Alexander S. Maclean made to the medical examiner of the defendant, certain statements and answers which are contained in the written declarations made by him to the said examiner, a copy of which declaration is attached to the amended declaration of the plaintiff: that, one of the questions in said declaration was as follows, to wit:

"14*a*. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered: "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have, at the time of making the same, a habit of drinking liquors, to wit: spirits; and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said A. S. Maclean: that, a knowledge of such existence or non-existence would have materially
48 influenced the judgment of the defendant in determining whether it would or would not issue a policy of insurance upon the said life: that a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life: that the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean:

25. That, at the time of the making of the application (a copy of which is attached to the declaration), the said A. S. Maclean made to the medical examiner of the defendant, certain statements and answers which are contained in the written declarations made by him to the said examiner, a copy of which declaration is attached to the amended declaration of the plaintiff: that, one of the questions in said declaration was as follows, to wit:

"14*a*. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered: "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have, at the time of making the same, a habit of drinking liquors, to wit: spirits; and that the existence or non-

existence of the said habit was material to the risk assumed by the defendant upon the life of the said A. S. Maclean: that, a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue a policy of insurance upon the said life: that a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life: that the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean: and that the said
49 Maclean knew at the time of making the said answer, of the existence of the said habit, and believed the same to be material to the said risk.

BLOUNT & BLOUNT,
Att'ys for Def't.

J. J. Hooton being duly sworn says that he is the agent of the defendant company, and that the foregoing pleas are true.

J. J. HOOTON.

Sworn to and subscribed before me this 15th day of March, A. D. 1901.

[SEAL.] E. H. ROSENSTEIN,
Notary Public.

Endorsed: Filed March 15th, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the 23rd day of April, A. D. 1901, the defendant, by its attorneys, filed its demurrers to the replications of the plaintiff, which demurrers were in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Florida.

A. A. FISHER, as Executor of Alexander Suter Maclean, Deceased, }
vs.
HOME LIFE INSURANCE CO. }

The defendant demurs to the third replication to the twenty-first plea, upon the ground that a want of knowledge by the said Maclean of the existence of the said habit would not prevent his false representation under the circumstances mentioned in said plea, from being a bar to recovery in this suit.

The defendant demurs to the fourth replication to the twenty-first plea, upon the ground that the alleged fact that the said Maclean was not conscious of the existence of the habit mentioned in said plea would not prevent the false representation alleged in
50 said plea under the circumstances therein set forth, from avoiding the said policy and preventing a recovery in this suit.

The defendant demurs to the third replication to the twenty-

second plea upon the same ground that it has demurred to the third replication to the twenty-first plea.

The defendant demurs to the fourth replication to the twenty-second plea upon the same ground that it has demurred to the fourth replication to the twenty-first plea.

BLOUNT & BLOUNT.
Attorneys for Def't.

I, William A. Blount, of counsel for defendant, certify that in my opinion the foregoing demurrers are well founded in law and make oath that they are not interposed for the purpose of delay.

W. A. BLOUNT.

Sworn to and subscribed before me this 18th day of April, A. D. 1901.

——— ———.

Endorsed: Filed April 23rd, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the 29th day of April, 1901, the plaintiff, by his attorneys, filed demurrers to the 23. 24 and 25 pleas of the defendant, which demurrers were in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Florida.

A. A. FISHER, as Executor, etc., }
vs.
HOME LIFE INSURANCE COMPANY. }

The plaintiff demurs to the defendant's plea numbered 23, filed March 15, 1901, because the same is bad in substance:

(*a*.) The allegations thereof taken in connection with the admitted allegations of the declaration, amendment of declaration and
51 exhibits, show that there was no warranty by said testator in regard to the matters set up as a defense in said plea.

(*b*.) The said plea shows that the failure of the defendant to require fuller answers to questions 14*a* and 14*b* of testator's declaration to the defendant's medical examiner, waived the right to question testator's estimate of his own habits.

(*c*.) The said plea shows that defendant left the matter inquired about to be answered according to testator's opinion, and it does not appear that testator did not state his honest opinion.

(*d*.) The said plea sets up no fact not appearing in the declaration, except an alleged habit, and as to that the failure of the defendant to require fuller answers to questions 14*a* and 14*b* of the testator's declaration to the defendant's medical examiner, waived the right to question testator's estimate of his own habits.

(*e*.) It appears that the defendant is estopped from making the said defense, because it appears that the said testator was advised

by the defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy, but yet that the policy was issued by defendant and premiums therefor received by it from the said testator, and that hence defendant will not be permitted to avoid its liability upon said policy upon the ground that the said answers were untrue, without alleging that the said testator was informed that the policy was issued on the faith of said answers.

(*f.*) It appears that testator in his application stated to defendant that he did drink spirits moderately.

And, plaintiff demurs to defendant's plea numbered 24, filed March 15, 1901, because the same is bad in substance, and
52 assigns the same grounds of demurrer as to 23.

And, plaintiff demurs to defendant's plea numbered 25, filed March 15, 1901, because the same is bad in substance, and assigns the same grounds of demurrer as to plea numbered 23.

TUNISON & LOFTIN &
JNO. C. AVERY,
Plaintiff's Attorneys.

I certify that in my opinion the foregoing demurrers are well founded in point of law, and make oath that the same are not interposed for the purpose of delay.

JNO. C. AVERY.

Sworn to and subscribed before me this 29th day of April, A. D. 1901.

E. R. BURGOYNE,
Notary Public, State of Fla.

[SEAL.]

Endorsed: Filed April 29th, 1901. F. W. Marsh, clerk.

And afterwards, to wit, on the 29th day of April, 1901, the court made and caused to be entered of record the following order in the said cause, to wit:

A. A. FISHER, as Ex'r, etc.,
vs.
HOME LIFE INS. CO.

The demurrers to the 3rd, 4th and 5th replications to the 17th plea, to the 4th replication to the 18th plea, to the 3rd, 4th and 5th replications to the 19th plea, to the 3rd and 4th replications to the 21st plea, and to the 3rd and 4th replications to the 22nd plea, coming on to be heard and the counsel for the parties having argued the same, and the court being advised of its decision;

It is ordered that the said demurrer be and is hereby sustained.

CHAS. SWAYNE, *Judge.*

Endorsed: Filed April 29, 1901. F. W. Marsh, clerk.

And afterwards, to wit, on the 2nd day of May, 1901, the following order was made and entered of record in the above-entitled
53 cause, to wit:

In the Circuit Court of the United States for the Northern District of Florida.

A. A. FISHER, as Executor, etc.,
vs.
HOME LIFE INSURANCE COMPANY.

This cause coming on to be heard upon plaintiff's demurrers to pleas numbered 23, 24 and 25, filed March 15, 1901, and the same having been argued by counsel for the respective parties and considered by the court; it is ordered;

That, the demurrers and each of them be and they are hereby sustained, with leave to defendant to plead further, as it may be advised.

Thus done and ordered this 2nd day of May, A. D. 1901.

CHAS. SWAYNE, *Judge.*

Endorsed: Filed May 2nd, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the 6th day of May, 1901, the following plea was filed by the defendant in the above-entitled cause, to wit:

In the United States Circuit Court, Northern District of Florida, at Pensacola.

A. A. FISHER, as Ex'r,
vs.
HOME LIFE INSURANCE COMPANY OF NEW YORK.

The defendant for further plea to the declaration, says:

26. That at the time of the making of the application (a copy of which is attached to the declaration), the said Alexander S.
54 Maclean made to the medical examiner of the defendant, certain statements and answers which are contained in the written declaration made by him to the said examiner, a copy of which declaration is attached to the amended declaration of the plaintiff; that one of the questions in said declaration was as follows, to wit:

"14*a*. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered; "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have at the time of making the same a habit of drinking liquors, to wit; spirits; and that the existence or non-existence of the said habit was material to the risk assumed by the

defendant upon the life of the said A. S. Maclean, and that the defendant was induced by the said answer of the said Maclean to issue the said policy.

BLOUNT & BLOUNT,
Att'ys for Defendant.

Thos. C. Watson, being duly sworn, says that he is the agent of the defendant and that the foregoing plea is true.

THOS. C. WATSON.

Sworn to and subscribed before me this 6th day of May, A. D. 1901.

E. D. BEGGS,
[SEAL.] *Notary Public.*

Endorsed: Filed May 6, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the 6th day of May, 1901, the following replication was filed to the foregoing plea, by the plaintiff herein, to wit;

In United States Circuit Court, Northern District of Florida.

A. A. FISHER, Executor,
vs.
HOME LIFE INSURANCE CO. OF NEW YORK.

55 Plaintiff extends his replications so that they shall apply to the plea this day filed and numbered 26.

TUNISON & LOFTIN &
JNO. C. AVERY,
Pl'ff's Att'ys.

Endorsed: Filed May 6th, 1901. F. W. Marsh, clerk.

And afterwards, to wit: on the 6th day of May, 1901, the following proceedings were had in open court, to wit:

A. A. FISHER, as Executor of the Last Will and Testament of Alexander S. Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws and a Citizen of the State of New York.

Law. No. 54.
Damages, $8,000.00.

This cause came on at this time to be heard upon the issues of fact contained in the pleadings, and upon the motion of the respective counsel in this cause, came the following jury, to wit: 1. J. E. McCann, 2. B. J. Gonzales, 3. Theodor Ingraham, 4. A. Miller, 5. Bryan Dunwody, 6. Charles G. Johnson, 7. T. W. Jones, 8. J. T.

Stubbs, 9. Arthur Johnson, 10. R. J. Brewton, 11. H. E. Cleveland, 12. John M. Coe, who being duly chosen, tried and sworn, whereupon defendant withdrew pleas numbered 16, 18, 19, 20 and 22 from the consideration of the jury, and after hearing a portion of the evidence, and it being the hour of adjournment, the jury, after being instructed by the court, was allowed to separate.

And afterwards, to wit: on the 8th day of May, 1901, the plaintiff herein, by his attorneys, withdrew his amendment to the declaration, which withdrawal was in writing and was as follows, to wit:

Circuit Court of United States, Northern Dist. of Florida.

56 A. A. FISHER, Executor,
vs.
HOME LIFE INS. CO.

Plaintiff withdraws the amendment of declaration filed herein.

TUNISON & LOFTIN &
JNO. C. AVERY,
Pl'ff's Att'ys.

Endorsed: Filed May 8th, 1901. F. W. Marsh, clerk.

And thereafter, to wit: on the 9th day of May, 1901, the following plea was filed in the said cause by the defendant's attorneys, to wit:

In United States Circuit Court, Northern District of Florida.

A. A. FISHER, as Executor of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY OF NEW YORK.

The defendant for further plea, says:

27. That it never undertook and promised in manner and form as in said declaration is alleged.

BLOUNT & BLOUNT,
Attorneys for Defendant.

J. J. Hooton, being duly sworn says that he is the agent of the defendant, and that the foregoing plea is true.

J. J. HOOTON.

Sworn to and subscribed before me this 9th day of May, 1901.

[SEAL.] E. H. ROSENSTEIN,
Notary Public.

Endorsed: Filed May 9th, 1901. F. W. Marsh, clerk.

To which plea the plaintiff, by his attorneys, then and there took issue, by statement to that effect in open court.

And thereafter, to wit: on the 9th day of May, 1901, came the said defendant, by *his* attorneys, and took issue upon the replications in the case, in the words and figures following, to wit:

57 In U. S. Circuit Court, Nor. Dist. of Fla.

A. A. FISHER, as Ex'r,
vs.
HOME LIFE INS. CO. OF N. Y.

The defendant takes issue upon all the replications of the plaintiff, to wit: the 1st and 2nd replications to the pleas 17–21 & 26.

BLOUNT & BLOUNT,
Att'ys for Def't.

5, 9, 1901.

Endorsed: Filed May 9th, 1901. F. W. Marsh, clerk.

And on the 7th day of May, 1901, the following proceedings were had in open court, to wit:

A. A. FISHER, as Executor of the Last Will and Testament of Alexander S. Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws of and a Citizen of the State of New York. } Law. No. 54.

This cause came on again to be heard on the testimony in the cause, and the jury aforesaid being in the box and the parties and their attorneys being in court, the said cause proceeded on the taking of testimony of witnesses, and it being the hour of adjournment, the jury after being instructed by the court, were allowed to separate.

And afterwards, to wit; on the 8th day of May, 1901, the following proceedings were had in open court, to wit;

A. A. FISHER, as Executor of the Last Will and Testament of Alexander S. Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws and a Citizen of New York.

58 This cause coming on again to be heard on the testimony of the witnesses, in the cause, and the jury aforesaid being in the box and the parties and their attorneys in court, the said cause proceeded on the taking of the testimony of witnesses, and it being the hour of adjournment, the jury being instructed by the court, were allowed to separate.

And on the following day, to wit: on the 9th day of May, A. D. 1901, the following proceedings were had in open court, to wit;

A. A. FISHER, as Executor of the Last Will and Testament of Alexander S. Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws and a Citizen of New York.

This cause coming on again to be heard on the testimony of the witnesses, in the cause, and the jury aforesaid being in the box, and the parties and their attorneys in the court, the said cause proceeded on the taking of the testimony of witnesses and it being the hour of adjournment, the jury being instructed by the court, were allowed to separate.

And on the following day, to wit: on the tenth day of May, A. D. 1901, the following proceedings were had in open court, to wit:

A. A. FISHER, as Executor of the Last Will and Testament of Alexander S. Maclean, Deceased,
vs.
THE HOME LIFE INSURANCE COMPANY, a Corporation under the Laws and a Citizen of New York.
} Law. No. 54.

This cause coming on again to be heard on the testimony of the witnesses in the cause, and the jury aforesaid being in the box, and the parties and their attorneys in court, the said cause proceeded, and after the argument of counsel and the charges of the court, the said jury retired to consider of their verdict, and after due deliberation came into court and presented the following verdict:
59 "We, the jury, find for the plaintiff in the amount of principal, $4,864.40, interest from Dec. 21st, 1899, to May 10th, 1901, $539.39, attorneys' fees at 10 per cent., $500.00, $5,903.79. J. T. Stubbs, foreman."

Whereupon, it is considered, ordered and adjudged by the court, that the plaintiff, A. A. Fisher, as executor of the last will and testament of Alexander S. Maclean, deceased, do have and recover of and from the said defendant, The Home Life Insurance Company, a corporation under the laws and a citizen of the State of New York, the sum of four thousand eight hundred and sixty-four dollars and forty cents, as principal, and the further sum of five hundred and thirty-nine dollars and thirty-nine cents, as interest thereon from the twenty-first day of December, A. D. 1899, to date, and the further sum of five hundred dollars as attorneys' fees in the conduct of this cause by the plaintiff, the above amounts so adjudged totaling the sum of five thousand, nine hundred and three dollars and seventy-nine cents ($5,903.79), together with interest from date until paid, together with the costs of this cause, legally taxed at the sum of $390.40, and that the plaintiff do have execution therefor.

And afterwards, to wit: on the first day of June, A. D. 1901, came the defendant herein, and filed in the office of the clerk of said court, the bill of exceptions certified as required by law, in the words and figures following, to wit:

60 In the Circuit Court of the United States, Northern District of Florida, at Pensacola, March Term, 1901.

I, Charles Swayne, judge of the said court, do hereby certify that during the progress of the cause pending in said court wherein A. A. Fisher, as executor of the estate of Alexander Suter Maclean, deceased, was plaintiff, and The Home Life Insurance Company of New York, was defendant, the following proceedings were had, viz:

On the 6th day of May, 1901, during a term of said court, the issues joined between the said parties, came on to be tried before a jury.

First Exception.

The plaintiff called as his first witness, John Eagan, who, after being duly sworn, testified that he had been a practicing lawyer in the city of Pensacola, Florida, for about fifteen years; that he was acquainted with the usual fees charged by attorneys-at-law in said city for the conduct of cases in the courts therein, and that he had examined the papers in this case and had formed an opinion as to what would be a proper fee for the attorneys for the plaintiff in this case in this court. Thereupon, the attorneys for the plaintiff asked him the following question, to wit:

"Judging from your experience testified about, and your knowledge of this case, what would be a reasonable and proper fee for the attorneys of the plaintiff, for the conduct of this case in this court?"

But to the said question and to any answer by the witness thereto, the defendant, by its attorney, then and there objected
61 because the plaintiff was not, without the act of the legislature of the State of Florida of the year 1893, being chapter 4173 of the Laws of said State, entitled to recover attorneys' fees, and that such statute was in contravention of the fourteenth amendment to the Constitution of the United States because it deprives insurance companies, including the defendant, of their property, without due process of law, and because it deprives insurance companies, including the defendant, of the equal protection of the laws.

But the judge of said court did then and there refuse to sustain the said objection and did permit the said question to be asked, and the said witness to answer the same, to which decision and action of the said judge, the defendant did then and there except.

Thereupon, the said witness answered that in his opinion a fee of seven hundred and fifty dollars would be a reasonable fee for the plaintiff to recover for his attorneys' fees in this cause in this court.

Second Exception.

Before the beginning of the testimony at the trial, the counsel for the defendant, in the presence of the court and jury, made the following offer, to wit:

"The defendant hereby consents that judgment shall be entered against it on the trial of this cause for the sum of five thousand dollars and interest, at the rate of eight per cent. per annum from the date of the death of the testator of the plaintiff, to wit, said Alexander Suter Maclean, and the costs of this suit, unless it, the defendant, shall make good one of the pleas filed by it and now at issue.

And demanded that the defendant should be permitted to open and close the argument of the case before the jury upon the ground that by said offer, the whole burden of proof was assumed by
62 the defendant.

The said judge declared that the defendant, upon such offer, would be entitled to the opening and closing, and that the same would be accorded to it, except for the fact that the plaintiff, in spite of said offer, still had the burden of proving what would be a reasonable attorney's fee for the plaintiff to recover, and upon that ground, the said judge refused to permit the defendant to open and close the argument of said cause before the jury, to which decision and action of the said judge, the defendant did then and there except; and the plaintiff did, thereafter, open and close the argument before the jury. Afterwards, and before the argument, after defendant had closed its evidence, in support of its pleas numbered 17, 21 and 26, plaintiff withdrew his amendment to the declaration, and thereupon defendant filed a further plea, in words and figues following: "That it never undertook and promised as alleged."

Third Exception.

During the trial, and before the argument of counsel began, the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"1. If you find that A. S. Maclean had ever before the application made by him to the defendant for the issuance of the policy in suit, had a habit of drinking spirits to excess, then you will find for the defendant."

But the said judge did then and there refuse to give the said instruction to the jury, to which decision and action the defendant did then and there except.

The court also instructed the jury as follows:

"If you find either one to be true—that before Maclean made application, he drank liquor either freely or to excess, or at the time that he made the application he had a habit of drinking liquor, you will find in this case for the defendant."

63 And at the request of the defendant, the court also instructed the jury as follows:

"6. The defendant, under the pleadings, is required to prove either that A. S. Maclean had, before the making of the application,

to wit, August 22, 1899, a habit of drinking spirits freely, or a habit of drinking spirits to excess, or had, at the time of his statement to the medical examiner, to wit, August 24, 1899, a habit of drinking spirits; but it is not necessary that the defendant should prove the existence of more than one of these habits."

And, at the request of the defendant:

"7. It is not necessary, in order that you may find for the defendant, that you should find that Maclean over drank spirits freely or to excess; it is only necessary, as to the extent of the drinking, that you should find that he had, at the time of his application, a habit of drinking spirits."

And, at the request of defendant:

"18. If you find that Alexander S. Maclean had ever, before the application made by him to defendant for the issuance of the policy in suit, had a habit of drinking spirits to excess, that such drinking was material to the risk, and that the defendant was induced to issue the policy by his representations that he did not have such habit, then you will find for the defendant."

There was testimony before the jury tending to show that before the application made by Alexander S. Maclean for the issuance of the policy in suit, he had a habit of drinking spirits to excess, and testimony tending to show that he did not have such habit.

Upon the trial, the deposition of George E. Ide was read, wherein, among other things, he testified that he was, in August and September, of 1899, president of the defendant company; that he was the person who finally passed upon and approved the application of the said Maclean for the issuance of the policy in suit: that, since September 1, 1899, to the date of passing upon the application of the
64 said Maclean by the said Ide, the defendant company had issued $17,047,919 of new insurance, the average policy being for $2,500.00; and that the total issue for the year 1899, including all forms of policies, annuities, revivals, &c., was 5,377: that he had, at that time before him, the application of Maclean (a copy of which is attached to the declaration), the statements of Maclean made to the medical, examiner of the defendant, and the medical examiner's report (both of which are attached to the amendment to the declaration), which amendment to the declaration was withdrawn before the case was submitted to the jury, and a report from the Holmes Mercantile Agency (a copy of which is hereinafter set forth) which was furnished to the defendant upon its application, which was received by the defendant after it had received the said application, the said declaration to the medical, examiner, and said medical examiner's report: that he had before him, no other papers, and was possessed of no other information regarding the said Maclean, or the risk to be assumed by the company: that witness would not have passed favorably upon the application if Maclean had not answered the questions in the application and statement to the medical examiner touching his habit of drinking spirits, and that if Maclean had said that he ever drank spirits to excess, he would not have passed favorably upon the application: that he had had such experience as to give him knowledge as to the practice and usage of life insurance

companies generally in accepting or rejecting applications for life insurance when the question of acceptance or rejection depends upon the habits of the applicant as to drinking spirits, and that, from that experience and knowledge he was able to say that the information that Maclean had a habit of drinking spirits would have led to an investigation as to the extent of that habit, and the information that the applicant, A. S. Maclean had a habit of drinking spirits to excess, would have led the defendant to reject the application and refuse the risk. There was no testimony tending to contradict this testimony of this witness.

65 Outside of the papers hereinbefore referred to in this exception, there was no testimony tending to show that the defendant was not induced to issue the policy by the statements of Maclean in his application, and his statements to the medical examiner, except the testimony of the members of the firm of T. C. Watson & Co., agents for Florida of the defendant company, and of Julius Menko, local soliciting agent of the defendant, that they signed the recommendation which appears opposite their names at the foot of the application; except that Thos. C. Watson of the firm of Thos. C. Watson & Co. testified that that firm were the general agents at Pensacola of the Home Life Insurance Co. of New York, and that Julius Menko was the company's soliciting agent at that place, employed by the firm: that his acquaintance with Maclean was slight, and that there was nothing known by him concerning Maclean to render it improper to recommend him as a proper person to be insured by the company: that Thos. C. Watson & Co. in approving the application of Maclean, were influenced by the recommendation given to them by Julius Menko: that there was some question with the said Maclean and with Thos. C. Watson & Co. as to whether the said Maclean was financially able to carry said insurance, as to which an investigation was made, with the result that he was accepted.

J. J. Hooton of the firm of Thos. C. Watson & Co., testified to the same effect, except that he said that he had known Maclean for about twelve years, and had met him from time to time.

Julius Menko testified substantially the same as Hooton.

Dr. J. Z. Cravey testified that Maclean came before him and was examined by him for insurance by the defendant: that he (Cravey) wrote the answers that appear as answers in the paper called the declaration to the medical examiner: that he did not undertake to use Maclean's language in answer to question 14*a*, but as to that answer, wrote his own conclusions from what Maclean said, and that Maclean afterwards read over the declaration and signed it:

66 that the omission of an answer to question 14*b*, was an omission made by him (the said Cravey) because he did not think it necessary, in view of the answer made to question 14*a*: that he was medical examiner of defendant at Pensacola, and had been for five or six years: that if Maclean had for four or five years been an excessive drinker of spirits and up to the time of his examination for insurance, the examining physician would have discovered it during the examination: that he (Cravey) did not discover in

his examination of Maclean, anything about him to indicate that the answers which were written out by him to questions propounded to Maclean, were untrue: that what he (Cravey), from his examination of Maclean, ascertained concerning Maclean and his physical condition and other things set forth in the medical examiner's report, he set forth in that report, and set forth truly: that every statement made by him (Cravey) in his report to the defendant, was true: that the effect of excessive alcoholic drinking, continued for years, upon certain organs of the human body, is generally such as that the same would be apparent in such examination as the medical examiner made of Maclean, in connection with the declaration to the medical examiner, and the medical examiner's report in evidence, and that Maclean did not have the appearance of a drinking man:

There was no testimony tending to prove the second replication of the plaintiff to pleas seventeen, twenty-one and twenty-six, except such as may be found in the papers hereinbefore referred to in this exception.

The report of the Holmes Mercantile Agency is as follows:

"Blank No. 8226; company No. 1.

Please accommodate expeditiously.

Holmes Mercantile Agency; Charles B. Holmes, proprietor.
91540.
Sep. 6, 1899.

Please hurry.

132 NASSAU STREET,
NEW YORK, *Aug.* 31*st*, 1899.

67 Information desired as below regarding Mr. Alexander Suter Maclean. Age given 34, residing at Pensacola, State Fla., county ——, street and number ——, and occupation journalist.

Companies please fill in these blank spaces fully and accurately so the person can be readily identified and located.

Medical Dep't.
Sept. 6, 1899.
Answered.
Home Life Ins. Co.

3577. Correspondent at —— kindly oblige by obtaining the following particulars as fully and expeditiously as practicable, and without publicity or interviewing the person or acquainting any one with the fact that the information is sought. If you cannot make the report please return this blank and fee without delay.

Please give as definite and full an answer to all these questions as possible.

1. Is the person older than 34 years?

2. Is the person able to carry $5,000 life insurance, $180 annual premium? I think so.

3. How long have you or your informants known the person? About seven years.

4. Has the person any other occupation than above? (Give particulars.) No.

5. Does the person's appearance indicate good health? Yes.

6. Has the person had any disease or bodily injury likely to affect the constitution (if so, what and when)? No.

7. Has any of the person's relatives had consumption, insanity or any hereditary disease that you know or can hear of? No.

8. To what extent does the person use wines, spirits, malt liquors or narcotics? (Answer fully.) Is a moderate drinker.

9. Has the person ever used wines, spirits, malt liquors or narcotics as a habit to intoxication or excess, and how long since?

68 I have never seen or heard of his being drunk.

10. Is the person of good moral character? Yes.

11. Is there anything moral, physical or financial that would make the person an undesirable subject for life insurance? No.

12. Does the person tend bar or keep a liquor saloon or disreputable resort of any kind, or — taken any treatment for the cure of liquor or morphine habit or uses morphine or opiates as a habit or is engaged or about to engage in any dangerous occupation or undertaking, or in any way is the life in peril on account of occupation, associations or surroundings? No.

13. ——.

—— ——.

(Omit signature.)

Please write on back any further information of interest."

In the lower left-hand corner of Maclean's application for insurance, a copy of which is attached to the declaration, was the written approval of Thomas C. Watson & Co. and Julius Menko, in the following words and form:

"This risk is approved and recommended by:

JULIUS MENKO, *Soliciting Agent.*
THOMAS C. WATSON & CO.,
General Agent."

And beneath that was the following:

"Officer's check.
Approved:
GEORGE E. IDE, *President.*

Aug. 31, 1899.
Hold for M/A report."

And in his deposition the said Ide testified that "M/A report" meant Mercantile Agency's report.

69 *Fourth Exception.*

During the trial, and before the argument of counsel began, the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"8½. The defendant has proved that the said A. S. Maclean made the representation charged, to wit: that on August 24, 1899, he had no habit of drinking liquors, and the defendant has proved that such representation was material to the risk to be assumed by the defendant, so that you will find that such representation was material to the risk."

But the said judge did then and there refuse to deliver the said charge to the jury, to which refusal and action the defendant did then and there except.

And the court further instructed the jury at defendant's request:

"8. The pleadings admit that the said A. S. Maclean made the representations charged in the pleas, to wit, the representation that he had not, before August 22, 1899, had a habit of drinking spirits freely, or a habit of drinking spirits to excess, and the defendant has proved that such representations were material to the risk to be assumed by the defendant, so that you will find that such representations were made, and that they were material to the risk."

And the court further instructed the jury, at the request of the defendant:

"10. Any habit of drinking spirits by Maclean was material to the risk if it tended to injure his health or shorten his life."

It appeared without contradiction, that Alexander Suter Maclean signed the declaration to the medical examiner. The examiner testified that the statements contained in said declaration that Maclean had no habit of drinking liquors, was not the language of Maclean, but was the construction put by the examiner upon

70 the answers of Maclean to inquiries put to him by the examiner at the time of the examination, Maclean saying to him that he took an occasional drink.

Dr. J. Z. Cravey testified that Maclean came before him and was examined by him for insurance by the defendant; that he (Cravey) wrote the answers that appear as answers in the paper called the declaration to the medical examiner; that he did not undertake to use Maclean's language in answer to question 14*a*, but as to that answer wrote his own conclusions from what Maclean said, and that Maclean afterwards read over the declaration and signed it; that the omission of an answer to question 14*b* was an omission made by him, the said Cravey, because he did not think it necessary, in view of the answer made to question 14*a*; that he was medical examiner of defendant at Pensacola, and had been for five or six years.

Upon the trial, the deposition of George E. Ide was read. Therein the following questions were asked him, and he gave the following answers:

Question 5. "State whether in passing favorably upon the appli-

cation of the said Maclean, and determining upon the issuance of the policy, you were induced wholly or in part by his answers to the questions submitted to him in the said application and the said statement to the said medical examiner, Dr. J. Z. Cravey, touching his habits as to drinking spirits. Would you or not have passed favorably upon the application if he had not answered such questions at all, or if he had answered that he drank spirits more than moderately, or that he had ever drunk spirits freely or to excess, or that he had a habit of drinking spirits?"

Answer to question 5. "Yes, I was. I would not have passed favorably upon it if he had not answered such questions at
71 all. If he had said that he ever drank spirits freely, more than moderately, or to excess, I would not have passed favorably upon the application. If he had said that he had a habit of drinking spirits, I would have had to be posted definitely as to the extent of the habit, before determining upon the application."

Question 7. "Have you or not had such experience as to give you knowledge as to the practice and usage among life insurance companies generally, in accepting or rejecting applications for life insurance, when the question of acceptance or rejection depends upon the habits of the applicant as to drinking spirits? If so, are you able to say, from such knowledge, that information that the applicant, A. S. Maclean, drank spirits more than moderately would have led the defendant to reject the application and refuse the risk? If so, state: Or that information that he drank spirits freely would have led to such rejection? If so, state: Or that information that he drank spirits to excess would have led to such rejection? If so, state: Or that information that he had a habit of drinking spirits would have led to such rejection? If so, state:"

Answer to question 7. "I have had such experience as to give me the knowledge referred to, and I am able to say from such knowledge, that the information that the applicant, A. S. Mclean, drank spirits more than moderately, would have led the defendant to reject the application and refuse the risk. I further say that information that he drank spirits freely, would have led to such rejection; information that he drank spirits to excess would have led to such rejection; information that he had a habit of drinking spirits, would have led, as I intimated before, to an investigation as to the extent of that habit."

There was no other testimony touching the materiality of
72 such representation, except the testimony of one Dr. Chapin, the medical director of the defendant, who testified substantially as did the witness, Ide. And except the application of assured and written approval thereof, as hereinbefore set forth, and the testimony of Drs. Anderson, Renshaw and Cravey, that the effect of habitual, excessive alcoholic drinking continued for years, would probably be such as to be discoverable upon examination of a party for life insurance, conducted as the examination of Maclean was conducted by Cravey as medical examiner for defendant, and by Renshaw as medical examiner for another company who subjected Maclean to a similar examination for that company; and

Drs. Renshaw and Cravey testified that Maclean did not appear to either of them to be a man who drank habitually, freely or to excess.

Fifth Exception.

During the trial, and before the argument of counsel began, the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course of practice of life insurance companies generally, it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

But the said judge did then and there refuse to deliver the same in charge to the jury, to which refusal and action the defendant did then and there except.

And the court, at the request of the defendant, instructed the jury as follows:

"8. The pleadings admit that the said A. S. Maclean made the representations charged in the pleas, to wit, the representation that he had not, before August 22, 1899, had a habit of drinking spirits freely, or a habit of drinking spirits to excess, and the defendant has proved that such representations were material to the risk to be assumed by the defendant, so that you will find that such representations were made, and that they were material to the risk."

73

And the court, at the request of the defendant, instructed the jury as follows:

"10. Any habit of drinking spirits by Maclean was material to the risk if it tended to injure his health or shorten his life."

The deposition of the witness, George E. Ide, in which he testified in answer to questions 5 and 7 as set forth in the fourth exception, had been offered by the defendant, and read in evidence to the jury; in which deposition the said George E. Ide had also testified that between the 1st of September, 1899, and the date of the examination of the said George E. Ide as a witness, to wit, the 24th of April, 1901, the defendant company had issued $17,047,919, of new insurance, the average policy being for $2,500.00, and that the total issue for the year 1899 including all forms of policies, annuities, revivals, &c., was 5,377 policies.

Sixth Exception.

During the trial and before the argument of the counsel began the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"11. You will find from the evidence that the defendant was induced by the representations of A. S. Maclean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon."

But the said judge did then and there refuse to deliver the said

charge to the jury, to which refusal and action the defendant then and there excepted.

And the court, at the request of the defendant, instructed the jury as follows:

74 "12. In order that the defendant may succeed in its defense, it must appear that it was induced to issue the policy sued on, by the representation of Maclean that he did not have a habit of drinking spirits, or of drinking spirits freely or to excess. Such inducement, however, appears from the fact that he was required, as a condition to the issuance of the policy, to answer questions touching the existence of such habits; that he did answer such questions by saying that he did not have such habits, and that such answers were made a part of the contract of insurance contained in the policy, and it is not necessary for the defendant to otherwise show that it was induced by such representations:"

And the court, at the request of the defendant, instructed the jury as follows:

"13. In order that the plaintiff shall show that the defendant was not induced to issue the said policy by the statements made in the application and to the medical examiner by the said Maclean that he had never used spirits freely or to excess, or that he had at the time of the application, no habit of drinking liquor, he must show by testimony outside of the policy, application, statement to the medical examiner, and medical examiner's report, that the defendant was not so induced. These papers, singly, or all together, do not show that the defendant was not so induced:"

And the court, at the request of the defendant, instructed the jury as follows:

"14. In making proof that the defendant was not induced by Maclean's representations, it will not suffice for the plaintiff to show that the defendant resorted to other sources in order to obtain information as to the desirability of the said Maclean as a risk to be insured, unless it affirmatively appears that the defendant relied solely upon the information obtained from such other sources,

75 and did not rely in the smallest degree upon the statements of the said Maclean. If it was induced, in the slightest, by such representations of Maclean to issue the policy, then it is immaterial that other considerations or inducements may have concurred with such representations:"

And the court, at the request of the defendant, instructed the jury as follows:

"15. The burden lies upon the plaintiff to prove that such representations of Maclean did not, in anywise, influence the defendant to issue the policy:"

And the court, at the request of the defendant, instructed the jury as follows:

"18. If you find that Alexander S. Maclean had ever before the application made by him to defendant for the issuance of the policy in suit, had a habit of drinking spirits to excess, that such drinking was material to the risk, and that the defendant was induced to

issue the policy by his representations that he did not have such habit, then you will find for the defendant:"

And the court, at the request of the defendant, instructed the jury as follows:

"19. If you find that A. S. Maclean had ever before the application made by him to defendant for the issuance of the policy in suit, had a habit of drinking spirits freely, that such drinking was material to the risk, and that the defendant was induced to issue the policy by his representation that he did not have such habit, then you will find for the defendant:"

And the court, at the request of the defendant, instructed the jury as follows:

"20. If you find that Maclean had, on August 24th, 1899,—two months before his death,—a habit of drinking spirits, that such habit was material to the risk to be assumed by the defendant, that
76 the defendant was induced to issue the policy by his representation that he did not have such habit, then you will find for the defendant:"

In addition to the questions 5 and 7 propounded to and answered by the witness George E. Ide, as set forth in the fourth exception, the following question was asked, and answered by the said witness, as hereinafter set forth, by deposition, which was read in evidence to the jury, to wit:

Question 6. "If you say that you had at the time of passing upon the application of the said Maclean, any information from any other source, state whether or not you relied upon such other information to the exclusion of reliance on the statements of the said Maclean contained in his application, and in his declaration to the medical examiner, Dr. J. Z. Cravey, or whether you would have favorably passed upon the application from him, the said Maclean, for such issuance, in reliance only upon any other statement or information in your possession, outside of and beyond the written application and statement to the medical examiner, Dr. J. Z. Cravey?"

He answered to the sixth interrogatory as follows:

"I would not have relied upon such other information to the exclusion of a reliance upon the statements of the said Maclean as contained in his application and in his statement to the medical examiner and I would not have favorably passed upon the application of Maclean for such issuance in reliance only upon statements from information derived from outside sources and beyond the written application or statement of the medical examiner."

There was no evidence upon the trial as to whether the defendant was, or not, induced by the representations of Maclean contained in the application and in the statements of the medical examiner, other than that above set forth and that set forth in the
77 third and fourth exceptions hereinabove written.

And the application of the assured, with the written endorsements thereon, and the declaration of assured to the defendant's medical examiner, and the medical examiner's report, and the testimony of Dr. J. Z. Cravey, the defendant's medical examiner, as hereinbefore set forth, and the testimony of T. C. Watson, J. J.

Hooton, and Julius Menko, as hereinbefore set forth in connection with other exceptions.

Seventh Exception.

During the trial of said cause, and before the argument of counsel began, the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"16. The plaintiff has not proved his replication, to wit, that the defendant informed Maclean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner, and informed him that if the said policy was issued as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean, and that the said Maclean understood and had reason to understand that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing, Maclean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts:"

But the said judge did then and there refuse to deliver the said charge to the jury, to which refusal and action, the defendant then and there excepted.

And the court, at the request of the defendant, gave to the jury the following instruction:

78 "17. If you find that the defendant, before it issued the policy sued on, notified the said Maclean that the policy would not be issued on the basis of a disclosure made by him in reference to the extent of his habitual indulgence in the use of spirituous liquors, then you must find for the plaintiff. The plaintiff, however, must prove such notification, and he must prove it by evidence outside of anything contained in the policy, application, statement to the medical examiner, and the medical examiner's report. There is nothing in these papers, singly, or taken together, which shows, or tends to show, any such notification:"

There was no testimony tending to prove the replication set forth in the foregoing instruction, unless it be found in the policy, application, statement of the medical examiner, report of the medical examiner, or report of the Holmes mercantile agency, or in the testimony of Dr. J. Z. Cravey, the medical examiner, as hereinbefore set forth in connection with other exceptions; or in the testimony of Watson, Hooton and Menko, as hereinbefore set forth in connection with other exceptions; or in the fact of the approval of the said application by said T. C. Watson & Co., and said Menko, as hereinbefore shown.

Eighth Exception.

During the trial, and before the argument of counsel began, the defendant requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"22. If you find that A. S. Maclean signed the declaration made to the medical examiner, which has been introduced in evidence, then you will find for the defendant:"

But the said judge did then and there refuse to deliver the said charge to the jury, to which refusal and action the defendant then and there excepted.

79 *Ninth Exception.*

During the trial, the plaintiff requested the judge to deliver in charge the following special instruction, to wit:

"1. In this case there are certain documents which the court will construe for you. You have before you a policy of insurance issued by the defendant to Maclean, insuring him in accordance with its terms, and connected therewith, you have an application in which certain questions were put to Maclean, and certain answers were made thereto by him. You have also before you a declaration made about the same time by Maclean to Dr. J. Z. Cravey, the medical examiner of the Home Life Insurance Company. It appears upon the declaration so made, which was prepared for the assured by the insurance company, that it and the application made to the insurance company for insurance on the life of Maclean were to be taken and construed together. The court instructs you in reference to those documents that there was no warranty made by Maclean to the insurance company in respect to whether Maclean drank wine, spirits or malt liquors, or to what extent he drank them."

The said judge then and there delivered and read the same to the jury, to the giving of which charge and the reading of same to the jury, the defendant did then and there except.

And the court, at the request of the defendant, instructed the jury as follows:

"8. The pleadings admit that the said A. S. Maclean made the representations charged in the pleas, to wit, the representation that he had not, before August 22, 1899, had a habit of drinking spirits freely, or a habit of drinking spirits to excess, and the defendant has proved that such representations were material to the risk to be assumed by the defendant, so that you will find that such representations were made, and that they were material to the risk."

80 And the court, at the request of the defendant, instructed the jury as follows:

"12. In order that the defendant may succeed in its defense, it must appear that it was induced to issue the policy sued on, by the representation of Maclean that he did not have a habit of drinking spirits, or of drinking spirits freely or to excess. Such inducement, however, appears from the fact that he was required, as a condition to the issuance of the policy, to answer questions touching the existence of such habits; that he did answer such questions by saying that he did not have such habits, and that such answers were made a part of the contract of insurance contained in the policy, and it is not necessary for the defendant to otherwise show that it was induced by such representations:"

Tenth Exception.

During the trial, the plaintiff requested the said judge to deliver in charge to the jury the following special instruction:

"11. The court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that, much is left to the discretion and judgment of the jury; and in connection therewith, the jury is authorized to consider the reasonable understanding and the belief of the assured:"

The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant did then and there except.

81 *Eleventh Exception.*

During the trial, the plaintiff requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"13. If upon the face of an application for insurance, or upon the face of a declaration intended by the parties to be used in connection with such application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue the policy without further inquiry, they waive the want of imperfection of the answer, and render the omission to answer more fully immaterial:"

The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant did then and there except.

Twelfth Exception.

During the trial, the plaintiff requested the said judge to deliver in charge the following special instruction, to wit:

"14. An insurance company cannot claim that a policy is void because the insured suppressed facts by failing to make any answer to questions in his application or declaration made in connection with his application, when the same was received by the insured without any objection:"

The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant did then and there except.

Thirteenth Exception.

During the trial, the plaintiff requested the said judge to deliver in charge the following special instruction, to wit:

82 "15. A waiver of the right to any information upon matters inquired of in one of the interrogatories to an applicant for insurance may be inferred upon the issuance of a policy upon an application in which this interrogatory is unanswered, although

the applicant had answered in the negative another interrogatory upon the same general subject:"

The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant did then and there except.

Fourteenth Exception.

During the trial, the plaintiff requested the said judge to deliver in charge to the jury the following special instruction, to wit:

"18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer that the company waived information upon that point:"

The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant then and there excepted.

Fifteenth Exception.

During the trial, the plaintiff requested the said judge to deliver in charge the following special instruction, to wit:

"28. If you find that the habits of Alexander S. Maclean the assured, in the usual, ordinary and every-day routine of his life, were temperate, then the representations made by him in his application and to the medical examiner were not untrue within the meaning of the conditions upon which the policy sued upon was issued:"

83 The said judge then and there delivered and read the same to the jury, to the giving of which charge, and the reading of same to the jury, the defendant then and there excepted.

Outside of the pleadings and the admissions made therein, the testimony applicable to this exception is to be found in the answers of George E. Ide to the fifth and seventh interrogatories, which together with the answers thereto, are set forth in full in the fourth exception.

There was testimony tending to prove that Maclean was, in the usual, ordinary and every-day routine of his life, temperate in his habits, and there was testimony tending to prove the contrary.

The said cause having been submitted to the jury by the court, under its charges, the jury rendered a verdict for the plaintiff against the defendant on the tenth day of May, A. D., nineteen hundred and one, for the sum of five thousand nine hundred and three & $\frac{79}{100}$ dollars ($5,903.79).

And, inasmuch as the said several matters objected to, or insisted upon, and considered by the court, do not appear by the record, said defendant did on the first day of June, A. D. 1901, after the expiration of said term, by virtue of a special order herein made, propose this, its bill of exceptions, to the said rulings of said judge, and

requested him to sign the same, which, after due notice to the attorneys of the plaintiff, is done this first day of June, A. D. 1901.

CHAS. SWAYNE,

Judge of the Circuit Court of the Fifth Judicial Circuit of the United States in and for the Northern District of Florida, at Pensacola Sitting.

Endorsed: Filed June 1st 1901 F. W. Marsh, clerk.

84 And afterwards, on the same day, to wit, on the first day of June A. D. 1901, came the said defendant, by its attorney, and filed in the office of the said clerk its assignment of errors in the words and figures following, to wit:—

In United States Circuit Court, Northern District of Florida.

A. A. FISHER, as Executor of the Estate of Alexander Suter Maclean, Deceased,
vs.
HOME LIFE INSURANCE COMPANY OF NEW YORK.

Now comes the Home Life Insurance Company, of New York, by its attorneys, and says that in the record, proceedings and judgment in the above-entitled matter, there is manifest error, in this, to wit:

First Assignment of Error.

That, the court erred in sustaining the demurrer to plea numbered one, filed January 28, 1901:

Second Assignment of Error.

That, the court erred in sustaining the demurrer to the plea numbered three, filed January 28, 1901:

Third Assignment of Error.

That, the court erred in sustaining the demurrer to the plea numbered twenty-three, filed March 15, 1901:

Fourth Assignment of Error.

That, the court erred in sustaining the demurrer to the plea numbered four, filed January 28, 1901:

85 *Fifth Assignment of Error.*

That, the court erred in sustaining the demurrer to the plea numbered six, filed January 28, 1901:

Sixth Assignment of Errors.

That, the court erred in sustaining the demurrer to the plea numbered seven, filed January 28, 1901:

Seventh Assignment of Errors.

That, the court erred in sustaining the demurrer to the plea numbered eight, filed January 28, 1901:

Eighth Assignment of Error.

That, the court erred in sustaining the demurrer to the plea numbered nine, filed January 28, 1901:

Ninth Assignment of Error.

That, the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorneys' fees in this cause as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions:

Tenth Assignment of Error.

That, the court erred in refusing to permit the defendant to open and close the argument of the case before the jury upon the consent proffered by the defendant to permit judgment to be entered against it on the trial of the cause, for the sum of five thousand dollars and interest at the rate of eight per cent. per annum from the
86 date of the death of the said Alexander Suter Maclean, and the costs of the suit, unless it, the defendant, should make good one of the pleas filed by it and now at issue, as set forth in the second exception of the bill of exceptions:

Eleventh Assignment of Error.

That, the court erred in refusing to deliver in charge to the jury, the special instruction asked by the defendant numbered one, as set forth in the third exception of the bill of exceptions, to wit:

"1. If you find that A. S. Maclean had ever before the application made by him to the defendant for the issuance of the policy in suit, had a habit of drinking spirits to excess, then you will find for the defendant."

Twelfth Assignment of Error.

That, the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered eight and one-half, as set forth in the fourth exception of the bill of exceptions, to wit:

"8½. The defendant has proved that the said A. S. Maclean made the representation charged, to wit: that on August 24, 1899, he had no habit of drinking liquors, and the defendant has proved that such representation was material to the risk to be assumed by the defendant, so that you will find that such representation was material to the risk."

Thirteenth Assignment of Error.

That, the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered nine, as set forth in the fifth exception of the bill of exceptions, to wit:

87 "9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course of practice of life insurance companies generally, it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

Fourteenth Assignment of Error.

That, the court erred in refusing to deliver in charge to the jury, the special instruction asked by the defendant, numbered eleven, as set forth in the sixth exception of the bill of exceptions, to wit:

"11. You will find from the evidence that the defendant was induced by the representations of A. S. Maclean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon."

Fifteenth Assignment of Error.

That, the court erred in refusing to deliver in charge to the jury, the special instruction asked by the defendant, numbered sixteen, as set forth in the seventh exception of the bill of exceptions, to wit:

"16. The plaintiff has not proved his replication, to wit, that the defendant informed Maclean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner, and informed him that if the said policy was issued as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said Maclean, and that the said Maclean understood and had reason to understand that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing, Maclean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts."

88 *Sixteenth Assignment of Error.*

That, the court erred in refusing to deliver in charge to the jury, the special instruction asked by the defendant, numbered twenty-two as set forth in the eighth exception of the bill of exceptions, to wit:

"22. If you find that A. S. Maclean signed the declaration made to the medical examiner, which has been introduced in evidence, then you will find for the defendant."

Seventeenth Assignment of Error.

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered one, as set forth in the ninth exception of the bill of exceptions, to wit:

"1. In this case there are certain documents which the court will construe for you. You have before you a policy of insurance issued by the defendant to Maclean, insuring him in accordance with its terms, and connected therewith, you have an application in which certain questions were put to Maclean and certain answers were made thereto by him. You have also before you a declaration made about the same time by Maclean to Dr. J. Z. Cravey, the medical examiner of the Home Life Insurance Company. It appears upon the declaration so made, which was prepared for the assured by the insurance company, that it and the application made to the insurance company for insurance on the life of Maclean were to be taken and construed together. The court instructs you in reference to these documents that there was no warranty made by Maclean to the insurance company in respect to whether Maclean drank wine, spirits or malt liquors, or to what extent he drank them."

89 *Eighteenth Assignment of Error.*

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eleven, as set forth in the tenth exception of the bill of exceptions, to wit:

11. "The court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury; and in connection therewith, the jury is authorized to consider the reasonable understanding and the belief of the assured:"

Nineteenth Assignment of Error.

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered thirteen, as set forth in the eleventh exception of the bill of exceptions, to wit:

"13. If upon the face of an application for insurance, or upon the face of a declaration intended by the parties to be used in connection with such application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue the policy without further inquiry, they waive the want or imperfection of the answer, and render the omission to answer more fully immaterial:"

Twentieth Assignment of Error.

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered fourteen, as set forth in the twelfth exception of the bill of exceptions, to wit:

90 "14. An insurance company cannot claim that a policy is void because the insured suppressed facts by failing to make any answer to questions in his application or declaration made in connection with his application, when the same was received by the insured without any objection:"

Twenty-first Assignment of Errors.

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered fifteen, as set forth in the thirteenth exception, of the bill of exceptions, to wit:

"15. A waiver of the right to any information upon matters inquired of in one of the interrogatories to an applicant for insurance may be inferred upon the issuance of a policy upon an application in which this interrogatory is unanswered, although the applicant had answered in the negative another interrogatory upon the same general subject:"

Twenty-second Assignment of Error.

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eighteen, as set forth in the fourteenth exception of the bill of exceptions, to wit:

"18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer that the company waived information upon that point:"

91 *Twenty-third Assignment of Error.*

That, the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered twenty-eight, as set forth in the fifteenth exception of the bill of exceptions, to wit:

"28. If you find that the habits of Alexander S. Maclean, the assured, in the usual, ordinary and every-day routine of his life, were temperate, then the representations made by him in his application and to the medical examiner, were not untrue within the meaning of the conditions upon which the policy sued upon was issued:"

Wherefore, the said defendant, The Home Life Insurance Company of New York, prays that the said judgment be reversed.

W. A. BLOUNT AND
A. C. BLOUNT,
Attorneys for Home Life Insurance Company of New York.

Endorsed: Filed June 1st 1901 F. W. Marsh clerk.

92 And thereupon, and on the same day, to wit, on the first day of June, A. D. 1901, the said defendant came and filed in the office of the clerk of said court a supersedeas bond in the matter of said appeal, which is in the words and figures following, to wit:

Know all men by these presents that we, The Home Life Insurance Company of New York, a corporation of the State of New York, principal obligor, and —— —— sureties, are held and firmly bound unto A. A. Fisher as executor of the estate of Alexander Suter Maclean, deceased, obligee, in the sum of ten thousand dollars ($10,000.00) for the payment whereof, well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Signed and sealed this first day of June, A. D. 1901.

The condition of this obligation is such, that whereas on May 10th, 1901, the obligee recovered in the circuit court of the United States for the northern district of Florida, at Pensacola, a judgment against the principal obligor, for the sum of five thousand, nine hundred and three & $\frac{79}{100}$ dollars ($5,903.79), to review which the principal obligor is prosecuting a writ of error to the Supreme Court of the United States:

Now therefore, if the said principal obligor shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make good its plea, then this obligation to be null and void, else to remain in full force and virtue.

HOME LIFE INSURANCE COMPANY
OF NEW YORK,
By GEO. E. IDE, *President.*

[Seal of Corporation.]

Attest: E. W. GLADWIN, *Secretary.*

THOS. C. WATSON. [SEAL.]
J. J. HOOTON. [SEAL.]

Approved.
CHAS. SWAYNE, *Judge.*

6, 1, '01.

Endorsed: Filed June 1st, 1901. F. W. Marsh, clerk.

93 And thereupon, and on the same day, to wit, on the first day of June, A. D. 1901, there issued out of said court, under the hand of the judge thereof, a citation in due form, directed to the

defendant in error, which, together with the return thereof, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To A. A. Fisher, as executor of the estate of Alexander Suter Maclean, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 29th day of June, nineteen hundred and one, pursuant to a writ of error, filed in the clerk's office of the United States, for the northern district of Florida, at Pensacola, wherein The Home Life Insurance Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Done this first day of June, A. D. nineteen hundred and one.

CHAS. SWAYNE,
Judge of the Circuit Court of the United States in and for the Northern District of Florida, at Pensacola.

UNITED STATES OF AMERICA, }
Northern District of Florida. }

I hereby certify and return that I served the annexed citation on the therein-named A. A. Fisher, executor of the estate of Alexander Suter Maclean, deceased by handing to and leaving a true and correct copy thereof with him personally at Pensacola Fla. in said district on the first day of June, A. D. 1901.

T. F. McGOURIN,
U. S. Marshal,
By H. WOLF,
Ch. O. Deputy.

Endorsed: Filed June 3rd, 1901. F. W. Marsh, clerk.

94 The respective parties to this cause, by agreement filed with the said clerk, stipulated that the foregoing, papers and proceedings copied as aforesaid, and no other, shall be included in the transcript upon the attached writ of error to the Supreme Court of the United States.

UNITED STATES OF AMERICA, }
Northern District of Florida. }

I, F. W. Marsh, clerk of the circuit court of the United States in and for the northern district of Florida in the fifth judicial circuit, by virtue of the attached writ of error, and in obedience thereto, and as a return thereof, do hereby certify that the foregoing pages numbered from one to ninety-four inclusive, contains a true and

complete transcript of the record and proceedings had in the circuit court of the United States aforesaid, in the cause of A. A. Fisher, as executor of the estate of Alexander Suter Maclean, deceased, *vs.* The Home Life Insurance Company, of New York, a corporation, and wherein the said Home Life Insurance Company is plaintiff in error, and the said A. A. Fisher executor as aforesaid, is defendant in error, as the same remains of record and on file in said court, and as stipulated by the respective parties thereto.

In testimony whereof, I have cause- the seal of said court to be hereunto affixed, at the city of Pensacola, in the district aforesaid, this twelfth day of June, in the year of our Lord one thousand, nine hundred and one.

Seal U. S. Circuit Court, Northern Dist. of Florida, Fifth Circuit.

F. W. MARSH, *Clerk.*

95 UNITED STATES OF AMERICA, *ss:*

To the President of the United States, the honorable the judges of the circuit court of the United States for the northern district of Florida, Greeting:

Because of the records and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court before you, or some of you, between A. A. Fisher, as executor of Alexander Suter Maclean, deceased, plaintiff, and The Home Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said defendant, The Home Life Insurance Company of New York, as in its complaint appears, we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given, that, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29 day of June, A. D. nineteen hundred and one, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein of correcting that error what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
96 of the said Supreme Court, the fir-t day of June, A. D. nineteen hundred and one.

Seal U. S. Circuit Court, Northern Dist. of Florida, Fifth Circuit.

F. W. MARSH,
Clerk of the Circuit Court of the United States in and for the Northern District of Florida.

Allowed by—
CHAS. SWAYNE, *Judge.*

97 [Endorsed:] A. A. Fisher as ex't'r *vs.* Home Life Ins. Co. of N. Y. Writ of error. The within writ of error served this June 1st 1901 by lodging and filing a copy for the defendant in error in the clerk's office of the United States circuit court for the northern district of Florida at Pensacola, Florida. Witness my hand & official seal this June 1 1901. F. W. Marsh, clerk. (Seal U. S. circuit court, northern dist. of Florida, fifth circuit.) Blount & Blount, Pensacola, Fla.

Endorsed on cover: File No. 18,208. N. Florida C. C. U. S. Term No. 355. The Home Life Insurance Company of New York, plaintiff in error, *vs.* A. A. Fisher as executor of the estate of Alexander Suter Maclean. Filed June 26, 1901.

Office Supreme Court U.S.
FILED
DEC 1 1902
JAMES H. McKENNEY,
Clerk.

No. 121.

Brf. of Blount for P. C.

Filed Dec. 1, 1902.

In United States Supreme Court,

October Term. 1902.

No. 121.

THE HOME LIFE INSURANCE COMPANY, OF NEW YORK, PLAINTIFF IN ERROR.

vs.

A. A. FISHER, AS EXECUTOR OF ALEXANDER SUTER MACLEAN, DEFENDANT IN ERROR.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of WILLIAM A. BLOUNT, Attorney for Plaintiff in Error.

E. O. WHITE, PRINTER, PENSACOLA, FLA.

In United States Supreme Court,

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No. 121.

THE HOME LIFE INSURANCE COMPANY, OF NEW YORK, PLAINTIFF IN ERROR.

vs.

A. A. FISHER, AS EXECUTOR OF ALEXANDER SUTER MACLEAN, DEFENDANT IN ERROR.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of WILLIAM A. BLOUNT, Attorney for Plaintiff in Error.

STATEMENT.

On December 21, 1899, defendant in error brought suit in the court *a quo* against the plaintiff in error. In his delaration (page 3 record) he alleged:

That on August 28, 1899, plaintiff in error issued to his testator, Alexander Suter Maclean, its policy of insurance upon his life for $5000.00, he being the beneficiary therein. That on October 16, 1899, Maclean died. That defendant in error duly qualified as Executor and received letters testamentary upon Maclean's estate. That he made due proofs of his death, and the plaintiff in error received them, but that the plaintiff in error refused to pay the amount alleged to be due upon the policy.

The defendant in error sued for $5000.00 (less unpaid premiums due for the current year) and interest and attorneys' fees allowed by the statute of the State of Florida.

To the declaration (and an amendment) were attached copies of the policy, of the application by Maclean for the

policy, of the declaration made by Maclean to the medical examiner, and of the medical examiner's report.

To this declaration the plaintiff in error filed twenty-seven pleas.

It is unnecessary to state the contents of all of them. Demurrers to eighteen of them were sustained; five were withdrawn, and the cause was tried upon issues made on four of them.

The error committed by the court below in sustaining the demurrers to the pleas were identical as to many of them; therefore, we have contented ourselves with selecting types of each class of pleas as those upon which we assign error.

The pleas thus selected are:

1. The first, third and twenty-third, which allege that the testator, Maclean, in his application for the policy in suit, made certain statements which were warranties, and which were untrue.

2. The fourth and sixth, which allege that the testator, Maclean, in the said application made certain statements which were representations which were material to the risk assumed by plaintiff in error in issuing the policy, and which were untrue.

3. The seventh, eighth and ninth, which were like the fourth and sixth except that they allege the manner in which the representations were material.

To each of these pleas, the defendant in error filed demurrers which were sustained.

The first class of questions before this court arises upon the propriety of sustaining these demurrers.

After the demurrers were disposed of against plaintiff in error, it filed four other pleas, the seventeenth, twenty-first, twenty-sixth and twenty-seventh. The first three were like the fourth and sixth above mentioned, except that they alleged that the plaintiff in error was induced by the answers of Maclean, to issue the policy. The twenty-seventh was a plea of non-assumpsit. The defendant in error took issue on all of these and filed special replications to the seventeenth, twenty-first and twenty-sixth, which replications alleged in substance that the plaintiff in error informed Maclean that it would not rely upon the statements made by him in his application or declaration to the

medical examiner, but upon information derived by plaintiff in error from persons and sources other than Maclean, and that thereafter Maclean understood that his representations were not relied upon, and acted upon that understanding. Plaintiff in error took issue upon this replication.

Trial was had on these issues, and the court refused to give several instructions requested by plaintiff in error, and gave instructions asked by defendant in error, all of which was duly objected and excepted to by plaintiff in error. These rulings are set out in the assignments and bill of exceptions, and need not be here set out *in extenso*.

Upon these arises the second class of questions before the this court.

During the course of the trial, the defendant in error sought to prove the value of the services of his attorneys in this suit in order that he might recover such fees against the plaintiff in error. He relied upon a statute of the State of Florida (set out in appendix hereto) permitting such recovery. The plaintiff in error objected to such proof because such statute contravened the fourteenth amendment to the Constitution of the United States in that it deprived insurance companies, including defendant, of their property, without due process of law, and in that it deprived insurance companies, including defendant, of the equal protection of the laws.

The court overruled the objection and the defendant excepted.

This ruling presents the third question to be decided by this court, and involves the federal question which confers jurisdiction upon the court.

The jury found a verdict for plaintiff for principal, interest and attorneys' fees, aggregating $5903.79.

Assignments of Error.

We do not set out nor discuss all the assignments of error. While we think them all good (except, perhaps, the ninth and tenth,) yet, many of them present practically the same question, and we therefore limit the number set forth and discussed to the number of distinct substantive questions presented.

Assignment Number One.

This assignment is:

"That the court erred in sustaining the demurrer to plea numbered one, filed January 28, 1901."

The plea referred to therein is plea one, page seventeen. The demurrer is on page twenty-three, and the order sustaining the demurrer is on page twenty-five.

Assignment Number Two.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered three, filed January 28, 1901."

The plea referred to is on page eighteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Three.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered twenty-three, filed March 15, 1901."

The plea referred to is on page thirty-six; the demurrer thereto is on page thirty-nine, and the order upon the demurrer is on page forty-one.

Assignment Number Four.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered four, filed January 28, 1901."

The plea referred to is on page eighteen, the demurrer thereto is on page twenty-four and the order upon the demurrer is on page twenty-five.

Assignment Number Five.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered six, filed January 28, 1901."

The plea referred to is on page nineteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Six.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered seven, filed January 28, 1901."

The plea referred to is on page nineteen; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Seven.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered eight, filed January 28, 1901."

The plea referred to is on page twenty; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Eight.

This assignment is:

"That the court erred in sustaining the demurrer to the plea numbered nine, filed January 28, 1901."

The plea referred to is on page twenty; the demurrer thereto is on page twenty-four, and the order upon the demurrer is on page twenty-five.

Assignment Number Nine.

This assignment is:

"That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorneys' fees in this cause as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions."

All the testimony relating to any of the exceptions is found in the third to seventh exception inclusive (pp. 47 to 57 of the transcript) and is so short and so easy of reference that it is deemed unnecessary to insert it under any of these assignments in this brief.

Assignment Number Thirteen.

This assignment is:

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant

numbered nine, as set forth in the fifth exception of the bill of exceptions, to-wit:

"9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course and practice of life insurance companies generally it would have led to the rejection of the risk if it had been known to the defendant before the issuance of the policy."

This charge and the refusal to give the same is set forth in the fifth exception, together with the testimony relating thereto (p. 54 of the transcript.)

Assignment Number Eighteen.

This assignment is:

"That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eleven, as set forth in the tenth exception of the bill of exceptions, to-wit:

11. The court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury and in connection therewith, the jury is authorized to consider the reasonable understanding and the belief of the assured."

The exception ten referred to in this assignment is to be found on page 59 of the transcript, but it adds nothing to the assignment except to show that the plaintiff in error excepted

Assignment Number Twenty-Two.

This assignment is:

"That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff numbered eighteen, as set forth in the fourteenth exception of the bill of exceptions, to-wit:

18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer that the company waived information upon that point."

The fourteenth exception referred to therein is to be found on page 60 of the transcript.

ARGUMENT.

We take up out of its order the ninth assignment of error because upon this depends the jurisdiction of the court and because it is the only one of those above set forth upon which we do not insist except as the means of invoking the aid of this court.

Ninth Assignment.

This assigns error in the court below in deciding that a statute of the State of Florida which permits plaintiffs successfully suing insurance companies upon policies of insurance to recover attorneys' fees in addition to amounts recovered upon the policy.

See Statute in Appendix.

At the time of raising the question in the court below and at the time of suing out the writ of error herein, the plaintiff in error relied upon cases which either directly or indirectly decided that such a provision is in conflict with the fourteenth amendment of the Constitution of the United States.

Phœnix Ins. Co. vs. Hart, 112 Ga. 765;

Williamson vs Liverpool L. & G. In. Co. 104 Fed. p. 32;

Gulf, C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150; and cases cited in these.

Since suing out the writ of error in this cause, and the lodging of the record here, this court has decided that such a statute does not contravene that constitutional amendment.

Fidelity & Mutual Life Ins. Co. vs. Mettler, 185 U. S. 308.

This decision, of course, prevents any further discussion of that question.

The court, however, in the same and previous cases decides that even if the contention of the plaintiff in error as to the invalidity of the statute be not well taken, yet that it raises a federal question and the court will consider all the other questions in the record. We therefore proceed to consider the other assignments of error.

Assignment Number One.

This assignment is:

"That the court erred in sustaining the demurrer to plea numbered one, filed January 28th, 1901."

The plea demurred to is:

"1. That the defendant required of the said Alexander Suter Maclean that he should, prior to, and as a condition of the issuance of the policy of insurance sued upon, make and sign an application to this defendant for the issuance of the said policy. That he did make, sign and deliver to the defendant such application and offered therein the statements and answers in it contained as a consideration for, and as a basis of, a contract with the defendant, under any policy issued upon said application. A copy of said application is annexed to the declaration. That, by the terms of the policy of insurance sued on the application became a part of the said contract of insurance. That in and by said application the said Alexander Suter Maclean warranted on behalf of himself or of any person who should have or claim any interest in any policy issued upon the said application, that the statements and answers in said application were true, full and complete; that in answer to question "9a" in said application, to-wit:

"9a.' "Do you drink wines, spirits or malt liquors?" he answered, "Yes"

And in answer to question "9b" in said application, to-wit:

"9b." If so, which of these, and to what extent?" he answered, "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made said answer, he had a habit of drinking spirits more than moderately.

The demurrer to the plea is as follows:

"1. Said plea does not, when taken with the admitted allegations of the declaration, show a warranty.

2. It appears that plaintiff's testator stated his estimate of his own habits, and that defendant waived any further disclosure touching the same.

3. It appears that defendant left the matter inquired about to be answered according to plaintiff's testator's opinion, and it does not appear that said testator did not state his honest opinion.

4. It does not appear that defendant in issuing said policy relied upon the answers of said testator to said questions.

5. It appears that in issuing said policy the defendant

did not rely upon the answers of said testator to said questions.

6. It appears that the said defendant is estopped from making the said defense because it appears that said testator was advised by defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy; but yet that the policy was issued by defendant and premiums therefor received by it from said testator; and, hence defendant will not be permitted to avoid its liability upon said policy upon the ground that said answers were untrue, without alleging that said testator was informed that the policy was issued on the faith of said answers.

7. Said plea is otherwise bad and insufficient in law."

The order sustaining the demurrer is found on page 25 of the transcript.

A proper disposition of this demurrer enables us to dispose of most of the other questions in the record and we therefore discuss the grounds *seriatim* and some what at length.

Ground one of demurrer to the first plea is as follows:

"1. Said plea does not, when taken with the admitted allegations of the declaration, show a warranty."

The plea sets up a warranty and a breach thereof. The demurrer says that the policy and the papers preliminary thereto (the application of the deceased, his declaration to the medical examiner and the medical examiner's report attached to and made a part of the declaration) do not show any warranty.

The court sustained this ground of the demurrer upon the authority of Moulor vs. American Life Ins. Co.; 111 U. S. 335, and cases following the principles of that case We think that we can demonstrate:

1. That the contract in suit contained the warranty relied upon by defendant.

2. That neither the Moulor case nor any other case decides otherwise.

3. That this court has never applied the principles of the Moulor case to one like the case at bar, and that the cases, State and Federal, involving contracts like this and citing the Moulor case, distinguish it from cases like this.

1. The plaintiff in error draws the warranty from the

following parts of the papers attached to the declaration and relied upon in the plea;

The questions and answers in the application:

"9a. Do you drink wines, spirits or malt liquors?"

Answer. "Yes," (page 8, of the transcript.)

"9b. If so which of them and to what extent?"

Answer. "Moderately," (page 8, of the transcript;)

The warranty in the application following the questions and answers;

"I warrant on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, that all of the foregoing statements and answers are true, full and complete, and are offered to the company as a consideration for and as the basis of the contract with said company under any policy issued under this application;"

The renewal of this agreement in the declaration to the medical examiner in the following words:

"I hereby declare that the accompanying application to the Home Life Insurance Company for an insurance on my life dated August 29th, 1899, was signed by me and that I renew my agreement therein;"

The incorporation of these statements and agreements into the policy as follows:

"THE HOME LIFE INSURANCE COMPANY

* * * * * * * *

By this policy of insurance in consideration of the statements and agreements made in the application for this policy which are hereby made a part of this contract * * * * does promise and agree to pay five thousand dollars to Alexander Suter Maclean, his executors, administrators or assigns immediately upon receipt and approval of proofs of death, etc."

The court below, upon the demurrer, decided that these "statements and agreements" did not constitute a warranty. That the court erred, seems clear.

The word warranty in insurance is but a convenient word to express a contractual relation which is entered into sometimes by the use of the words "warrant" or "warranty," but which may as well be created by the use of other words declaring entry into such contract, or by such use of other words as to necessarily imply the entry into such contract.

The contract is the contract of the assured that a given state of facts is or has not existed, does or does not exist, or shall or shall not exist. If he contracts that his statements, no matter what form they may take, are true, then such statement constitutes a warranty. At this day such a contract is usually contained in the word "warrant" (which in this sense means nothing more than "formally contract,") but even now there are frequently used the words "agree" "contract" "covenant" and other equivalent terms which indicate a clear design on the part of the assured to make his statement a part of the contract, so that if it be untrue, the contract is broken.

It follows necessarily that if the untruth of a statement breaks the contract, the untruth of any part of it has the same effect, and hence the rule that no matter how immaterial the statement may seem to be, or how small its departure from the truth, the breach is complete, which is equivalent to saying that any fact warranted must be literally true. The warranty rests wholly upon the contract and it is incumbent upon the party relying upon it to show the contract.

This distinction necessarily implies that all assertions and statements of the assured entering into the negotiation for insurance not a part of the contract must have another name and a different effect. We therefore find that as a matter of convenience such outside matters are called representations and that the untruth of them is not destructive of the rights of the assured and those holding through him, unless they be not only untrue, but of a matter material to the risk. The reason is obvious. The parties not having contracted about it the effect of the untruth must be found in another of the great branches of the law, i. e., of the law of tort, and under the most elementary principle of such law no one can complain against whom a fraud has been committed unless he be injured by it, and there can be no injury to an insurer arising out of the untruth of the assertion made to it by the insured, unless the untruth be as to a matter material to the risk.

These principles are now elementary, but our excuse for repeating them is that at least one learned judge, the judge below, has ignored them. Under the same excuse we verify them by a citation of the following definitions and authorities:

Justice Clifford says:

"When the policy contains a clause declaring that the application forms a part of the contract all the material statements in the answers of the applicant are thereby changed from representations into warranties."

And again

"When the representations of the insured are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer."

Eddy St. John Foundry vs. Hampden, etc., 1 Cliff., 300; Fed. Cas. No. 4277.

May on Insurance under a discussion of what a warranty is, thus states the doctrine:

"Usually the application, proposals, conditions annexed and by-laws are referred to in the policy itself, or they are declared to be the basis upon which it is made, or the policy is declared to be issued upon the faith thereof. When this is the case of course there is no room for doubt." Sec. 158.

And again:

"As a rule when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force and effect of warranties." Sec. 159.

"The main distinction between a warranty and a representation is that while the former is an agreement constituting a part of the contract, the latter is but a statement incidental thereto, is to be carefully observed as it carries with it important consequences. A warranty enters into and forms a part of the contract itself." Sec. 183.

Lord Eldon says:

"It is the first principle of the law of insurance that a warranty is a part of the contract that the matter is such as it is represented to be; the materiality or the immateriality signifies nothing; the only question is as to the mere fact." 58 Ark 528

In Cushman vs. Ins. Co. 70 N. Y. 72, it was decided:

"That the application for the insurance was a part of the policy and that the answers to the questions therein contained were therefore warranties."

2. The case of Moulor vs. Am. Life Ins. Co. 111 U. S. 335, does not decide otherwise.

The court below based its decision upon the ground that in this case, as in that, the word "warranty" while found in the application was not carried forward into the policy, and that in this case the word "statement" was used in the policy, to which it gave the same effect as this court gave to the word "representations" used in the policy in that case.

We apprehend, however, that we can demonstrate that this policy is very different from that, so far as this question is concerned.

That case is distinguishable from this in the fact that there the warranty was that the answer should, among other things, be "fair," not "evasive," nor "misrepresentations," that the causes rendering insurance on the assured's life void should be "known causes" and the policy spoke of the "representations" made in the application. The court found, applying the well known rule of construction against insurance companies which prepare the policies, that these provisions not only indicated no contractual obligation upon the assured, that his statements should be true, but that as representations his obligations only extended to the existence of good faith on his part because the terms of the application implied that the policy was not to be annulled unless the cause of disease inquired about was "known" to him, or unless his answers were "unfair," or "evasive" or "concealments," all of which implied the absence of good faith.

In the case at bar the circumstances are similar in only one respect, i. e., that the word "warranty" is not found in the policy itself.

It is not necessary that this word should appear in the policy, as we have shown and as appears in the cases hereinafter cited as commenting upon and distinguishing the Moulor case and as appears in the Moulor case itself.

Moulor vs. Am. Life Ins. Co. 111 U. S. p. 342.

See also Aloe vs. Mutual, etc. Asson. 147 Mo. 575.

In the Moulor case the absence of the word "warranty" from the policy was evidently not, but the substitution for it of the word "representations" was, the determining feature with this court, and the court held that this latter word in conjunction with the other provisions which we have quoted controlled the word "warranty" in the application

In the case at bar the application distinctly warranted

the truth of the answers and the policy as distinctly made the statements and agreements in such application a part of the policy. There is no word qualifying the explicitness of these contractual provisions and we have found no case in which such provisions were not held to be a warranty.

3. That this court did not intend in the Moulor case to impugn the general rule that if there be a warranty or contract of the truth of any statements in the application and the application be incorporated into the policy by reference or otherwise, there is a warranty, and that it decided the Moulor case upon the peculiar language of the policy and the application therein, is amply shown by its approval in that case of cases inconsistent with any such intent, by its own subsequent application of the general rule and by the consensus of subsequent decisions of Federal and State courts that there was no such intent.

It approved (p. 341) the cases of

Jeffries vs. Life Ins. Co. 22 Wall. 47;

Etna Life Ins. Co. vs. France, 91 U. S. 510.

In the former case the policy provided that the insurance was accepted upon the faith that the statements and declarations in the application were true and this court held such statements and declarations to be warranties.

In the latter case, the policy declared that the application was the basis of the contract and a part and parcel of the policy and that the untruth of the statements in the application should avoid the policy and this court made the same ruling as in the Jeffries case.

This court also applied the general rule in Imperial Fire Ins. Co. vs. Coos County, 151 U. S. 463, where it said

"But the rule is equally well settled that contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used and if they are clear and unambiguous their terms are to be taken and understood in their plain and ordinary and popular sense."

And where it quoted with approval the language of the Court of Appeals of New York as follows:

"These conditions when plainly expressed in a policy are binding upon the parties and should be enforced by the courts if the evidence brings the case clearly within their meaning and intent. It tends to bring the law into disrepute when by astute and subtle distinctions a plain case

is attempted to be taken without the operation of a clear reasonable and material obligation of the contract."

Mack vs. Rochester Ins. Co. 106 N. Y. 560–4.

The lower Federal courts have applied the general rule to cases where the language in the application and the reference to and incorporation of the application in the policy were like the one at bar and have specifically distinguished the Moulor case in

Provident Savings Life Insurance Co. vs. Llewellyn, 58 Fed. 940;
Brady vs. U. S. Life Ins. Co. 60 Fed. 727;
Kelley vs. Mutual, etc., Ins. Co. 75 Fed. 637;
Hubbard vs. Mutual, etc., Co. 100 Fed. 721.

And so have the State courts.

Provident Savings Life Ins. Co. vs. Reutlinger, 58 Ark. 533;
Aloe vs. Mutual Reserve, etc., 147 Mo. 575;
Jackson vs. Union, etc., Ins. Co. 83 Maine, 182;
Weil vs. N. Y. etc., Ins. Co. 47 La. Ann;
Boyle vs. N. W. Mut. etc., 95 Wis. 318;
Dwight vs. Germania Ins. Co. 103 N. Y. 541.

We think that no further citation or argument is necessary to show that the assured warranted the truth of the statements set forth in the plea.

The second ground of demurrer to the first plea.

This ground is:

"2. It appears that plaintiff's testator stated his estimate of his own habits and that defendant waived any further disclosure touching the same."

This contention is founded upon the assertion that the court will look at all the papers, the policy, the application and the declaration to the medical examiner, in order to construe any one of these and to determine the rights of the parties; that in the declaration to the medical examiner in this case the following questions were answered (or unanswered,) thus:

"14a. Do you drink wines, spirits or malt liquors daily or habitually?"

Answer. "No habit of drinking liquors."

"14b. If so, which of them and to what extent daily?"

Answer. . . ..(transcript, page 19 at bottom;)

that the defendant did not insist upon an answer to this last question and by failing to do so, accepted the opinion of A. S. Maclean that he had no habit of drinking liquors and under the decision of Raddin vs. Phœnix Ins. Co. 120 U. S., waived any disclosure of facts which would have shown that opinion to be erroneous: and that the questions and answers (9a and 9b) which were alleged to be untrue are analagous and the same effect as to these must given to such waiver.

This is a total misapplication of the doctrine of the Raddin case. In that case there were included in one division of the policy four questions. The answer given was complete and full as to one of them and did not purport to answer the others, and the court held that a failure to require a further answer to these others was a waiver of the right of the company to insist that they were unanswered, and that the want of an answer was a concealment which avoided the policy.

In the case at bar the question was two-fold, Do you drink wine, etc., daily? Do you drink wine, etc., habitually? The first branch of the question was left unanswered and the failure of the insurer to insist upon an answer precludes it from relying upon the failure to answer. But the second question was fully answered by an emphatic declaration "no habit of drinking liquors" This was a distinct assertion of fact and its untruth (as alleged in the plea) avoided the policy.

The fact that the assured did not answer the second question is entirely immaterial, for the question was intended to be answered only if the assured admitted that he drank daily or habitually. He admitted neither of these but denied that he had a habit and it would have been senseless to pursue an inquiry as to what extent he had a habit when he had said he had no habit at all.

Nor is the failure to require an answer to question B and a failure to push the assured as to what his idea of a habit was an acceptance of his own opinion of what constituted a habit of drinking liquors and a waiver of the right on the part of the insurer to insist that habit *vel non* was a question of fact to be judged by a judicial tribunal and not by the opinion of the assured. The insurer asked what as a

matter of fact his habit was and he answered that as a matter of fact he had no habit. There was no intimation in the policy or elsewhere that he was to state only his opinion or estimate, but a clear provision that his answer to this, as to all the other questions, must be full, complete and true.

The third ground of demurrer to the first plea.

This is:

"3. It appears that defendant left the matter inquired about to be answered according to plaintiff's testator's opinion and it does not appear that said testator did not state his honest opinion."

This raises no question different from that just discussed and we do not further pursue it.

The fourth ground of demurrer to the first plea.

This is:

"4. It does not appear that the defendant in issuing the said policy relied upon the answers of said testator to the said questions."

The idea in this demurrer and in the demurrer hereinafter to be discussed is that it must appear affirmatively from the declaration that the insurer relied upon, i. e., was induced, by the answers of the insured to issue the policy. The answer to this is obvious; that if the answer be a warranty, as we think we have shown, it became a part of the contract and, of course, it is not necessary for a plaintiff suing for a breach of a contract to allege that he was induced to enter into it by the assumption of a contractual obligation by the other party. The one contract is the consideration for the other and if the consideration appear upon the face of the contract itself it is not necessary to allege it. In this case the plea alleges that the insured offered the answer as "consideration" for and "as the basis of the contract." In no case is it necessary in a suit on a contract to show why either contracting party was induced to enter into it.

Even though this answer was a representation it would be presumed that it induced a reliance upon it by the insurer, as we shall hereafter show, but since this is a plea of warranty and since the question arises upon a subsequent plea of representation, we do not discuss this phase now, but defer it.

The fifth and sixth grounds of demurrer to the first plea.

These are:

"5. It appears that in issuing said policy the defendant did not rely upon the answers of said testator to said questions."

"6. It appears that the said defendant is estopped from making the said defense, because it appears that the said testator was advised by defendant, or by its procurement, that his answers would not be taken as a basis for the issuance of the said policy; but yet that the policy was issued by defendant and premiums therefor received by it from said testator; and, hence defendant will not be permitted to avoid its liability upon said policy upon the ground that said answers were untrue, without alleging that said testator was informed that the policy was issued on the faith of said answers."

These are practically the same and mean, as shown by the argument of the counsel for the in-ured in the court below, that the insurer showed affimatively by its own declaration that it would not accept the statement of the insured that he drank moderately.

This declaration is found in the declaration to the medical examiner immediately after questions "14a and 14b" (transcript p. 13,) and is as follows:

"Note. State the daily amount. General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

From this the plaintiff drew the conclusion that since the insurer declared that it would not accept such statements, it was equivalent to a declaration that it would not rely upon them and that it was immaterial whether they were true or not true

No such construction can be properly given. This note was an instruction to the medical examiner to whom these answers were made and it was an admonition to him that time would be wasted by further correspondence if he failed in the first instance to procure specific answers. If in fact, however, a general answer was given and in fact accepted by the insurer, it was entitled to rely upon the warranty that such statement was "true, full and complete."

Assignments Number Two and Three.

The second assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 3, filed January 28th, 1901."

The third plea referred to in the assignment is as follows:

"3. That in the application mentioned in the first plea containing the warranty therein mentioned, the said Alexander S. Maclean was asked questions numbered 9a and 9c, to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9c. Have you ever used them freely or to excess?"

To the question 9a he answered, "Yes." And to the question 9c he answered, "No."

The defendant avers that the said answer to the said question 9c was not true, full and complete, because, prior to the making of the said answer, he had a habit of using spirits to excess."

The third assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 23, filed March 15th, 1901."

The twenty-third plea referred to therein is as follows:

"23. That at the time of the making of the application (a copy of which is attached to the declaration,) the said Alexander S. Maclean made to the medical examiner of the defendant certain statements and answers which are contained in the written declaration made by him to the said examiner, a copy of which declaration is attached to the amended declaration of the plaintiff, that by said written declarations and the application and the policy, the said statements made by the said Maclean became and were warranties, that one of the questions in said declaration was as follows, to-wit:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

To this question the said A. S. Maclean answered. "No habit of drinking liquors."

The defendant avers that said answer was not true, because the said A. S. Maclean did have at the time of making the same a habit of drinking liquors, to-wit, spirits."

The demurrer to each is the same as that set forth in full in

the argument upon the preceding assignments and is found on page 23 of the transcript.

The argument upon these assignments is the same as upon the first. The character of the questions and answers in each, however, is such as to eliminate the argument for the defendant in error that the announcement of the insurer that general terms such as "moderately" was a declaration that if such answer should be made the insurer would not rely on it. In the pleas numbered 3 and 21 the answers of the assured were positive that he had never used the designated liquors "to excess" and that he had "no habit of drinking liquors" and there is no reason for a contention that the insurer did not rely upon these positive denials.

Assignments Numbered Four and Five.

The fourth assignment is:

"That the court erred in sustaining the demurrer to the plea numbered 4, filed January 28th, 1901."

The fourth plea referred to in this assignment is as follows:

"4. That the defendant required of the said Alexander S. Maclean that he should prior to and as a condition of the issuance of the policy of insurance sued upon make and sign an application to this defendant for the issuance of the said policy. That he did make, sign and deliver to the defendant such application and offered therein the statements and answers in it contained as a consideration for and as the basis of the contract with the defendant under any policy issued under the said application. A copy of said application is annexed to the declaration. That by the terms of the policy of insurance sued on the said application became a part of the said contract of insurance.

That in and by said application the said Alexander S. Maclean represented that the statements and answers in said application were true, full and complete. That in answer to question 9a in said application, to-wit:

"9a. Do you drink wines, spirits or malt liquors?" He answered, "Yes." And in answer to question 9b in said application, to-wit:

"9b. If so, which of these and to what extent?" He answered, "Moderately."

The defendant avers that said answers were not true, full and complete because at the time that he made said answer

he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant, upon the life of the said Alexander S. Maclean."

Assignment No. 5 is:

"That the court erred in sustaining the demurrer to the plea numbered 6, filed January 28th, 1901."

The sixth plea referred to in this assignment is:

"6. That in the application mentioned in the fourth plea containing the representations therein mentioned the said Alexander S. Maclean was asked questions numbered "9a" and "9c," to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9c. Have you ever used them freely or to excess?"

To the question "9a" he answered, "Yes."

To the question "9c" he answered, "No."

The defendant avers that the said answer to the said question "9c" was not true, full and complete because prior to the making of the said answer the said Maclean had a habit of using spirits to excess and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. Maclean."

The demurrers to each of these is the same as the demurrer to the first plea set set forth in argument upon assignment No 1, and is found in transcript, page 23.

This plea differs only in the reliance upon the untruth of different representations made by the assured and are pleas setting up as representations the same matter set up as warranties in the pleas already discussed.

The arguments already made apply to them, but the counsel for plaintiff in the court below contended there, and probably will here, that the pleas were additionally defective because:

1. They rely upon the untruth of representations but fail to allege that such representations induced the insurer to issue the policy. And

2. That the allegation that such representations were material was a conclusion of law and therefore not good, and that it was incumbent upon the defendant to show the manner in which the representations were material.

1. As we read the law if a statement not a part of a contract be voluntarily offered by one party to induce the other

to enter into the contract the party relying upon the untruth of such statement as an answer to an action based upon his breach must allege and prove that he was induced by such untrue statement to enter into the contract, but when he makes inquiry of the other party about matters connected with the contract and receives answers to such inquiries, he will be presumed to have relied upon, and to have been induced by, such answers.

Cook vs. Finkler, 9 Mich. 131–133.

The inducement in this case is found in the questions and answers in the application and accompanying papers, which are made a part of the declaration and pleas and it was unnecessary to allege formally any inducement.

2. The question of materiality is closely akin to the question of inducement, for, as most of the following authorities show, that is material which influences the insurer in making up its mind whether it will or will not enter into the contract.

These pleas allege that the representations made by the assured in the application were material. The plaintiff demurring says that this was pleading a conclusion of law. This may be true, but even if so the plea was good, for upon the policy and the application and the declaration to the medical examiner, all attached to the declaration in this suit, materiality of the representations appeared as a matter of law.

As we understand the law determining the question as to when materiality of representation made in the obtaining of an insurance policy is a question of law for the court and when a question for the jury is as follows:

A. It is for the court;

X. When the parties have by the contract made the representation a part of the policy or the basis or consideration of it and stipulated that it is true. In such case, the parties have expressly and conclusively made it material.

This court has said on this subject:

"But the parties may by their contract make material a fact that would otherwise be immaterial or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject and whether such insurance has been applied for and refused are material facts, at least when statements regarding them are required by the insurers as a part of the basis of the contract. * * *

"Where an answer of the applicant to a direct question of the insurer purports to be a complete answer to the question any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."

Phœnix Life Ins. Co. vs. Raddin, pp. 189–190.

And this court has pointedly declared:

"This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties They need not be representations even, if this term conveys an idea of an affirmation having any technical character. "Statements and declarations" is the expression what the applicant states and what the applicant declares. * *

"The Company deems it wise and prudent that the applicant should inform it truly whether he has made any other application to have his life insured. So material does it deem this information that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the Company to take from it its acknowledged power thus to make its opinion the standard of what is material and to leave that point to the determination of a jury. The jury may say as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way namely, that he is single or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the Company, the question cannot be deemed immaterial."

Jeffries vs. Economical Mutual, &c., 22 Wall. 47;
Price vs. Phœnix, 17 Minn. 473, 490;
Aetna Life Ins. Co. vs. France, 91 U. S. 510;
Campbell vs. N. Y. Life, &c., 98 Mass. 403;

And authorities under next head.

Y. When the representation consists of a written answer to a written question touching the insurance and relevant thereto. In such case the parties have impliedly but conclusively made it material.

"The parties may by the frame and contents of the papers either by putting representation as to the quality, history or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, and when they have done so, the applicant for insurance cannot afterwards be permitted to show that the fact which the parties have thus declared material to be truly stated to the insurer, was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question."

"Although the particular nature of the assured's title in the property insured need not be stated unless inquired about by the insurers, yet a substantially untrue answer to a question put to him by them in relation to his title would avoid the policy without regard to the mode in which the application was referred to in the policy."

Campbell vs. New England, &c., 98 Mass. 401, 407;
Wilson vs. Conway, 4 R. I. 141, 156, *et seq.*;
Anderson vs. Fitzgerald, 4 House of Lords, 484;
Miller vs. Mutual, &c., Ins. Co. 31 Ia. 216, 232;
Price vs. Phœnix Mutual, &c., 17 Minn. 473, 490, 491;
Davenport vs. New England, &c, Co. 6 Cushing, 341;
May on Insurance, Sec. 185, *et seq*;
N. A. Fire Ins. Co. vs Thorp, 22 Mich. 166, 167;
Ryan vs. Springfield, &c., 46 Wis. 673, 674;
Clark vs. Manufacturers Ins. Co. 8 How. 247.

In this last case the distinction between the representation made by an answer to an inquiry and a concealment where no question is propounded, is clearly drawn.

Z. When the representation, though in neither of the forms mentioned is of such a nature and so related to the character of insurance required that the court can see that it naturally if not necessarily would have affected the insurers in determining whether to accept or reject the risk. For example: A representation in obtaining fire insurance that the property sought to be insured was not mortgaged when in fact it was, or that lamps were not used in a building sought to be insured when in fact they were; or, in a life policy, that the present residence was in the White Mountains when in fact it was in Vera Cruz, would be held by the court as a matter of law to be material.

"Whenever the nature of this interest would have or might have a real influence upon the underwriters either not to underwrite at all or not to underwrite except at a higher premium, it must be deemed material to the risk, and if so the misrepresentation or concealment of it will avoid the policy."

The Columbia Ins. Co. vs. Lawrence, 10 Pet. 516.

In that case there was a representation contained in the proposal but not in answer to an inquiry.

Columbia Ins. Co. vs. Lawrence, 2 Pet. 22, 48, 49;
Farmers Ins. Co. vs. Snyder, 16 Wend. 490;
Clason vs. Smith, 3 Wash. (C. C.) 159.

* * * * * * * * * * *

In all the foregoing cases the representations differ from warranties only in that the former need be only substantially true, while the latter must be literally true. In both, the materiality is not open to question or issue before a jury.

B. The question of materiality is for the jury in all cases where it has not been fixed by the parties and may depend upon considerations which may not be clear or as to the effect of which upon the insurer men may reasonably differ, or where the facts are not undisputed or perfectly plain:

Farmers Ins. Co. vs. Snyder, 16 Wend. 490;
Campbell vs. New England Ins. Co. 98 Mass. 402;
May on Ins. Sec. 184;

And *passim* authorities *supra*.

* * * * * * * *

In the case at bar, the truth of the representations was made material not only by the stipulations of the parties that they should be true and that they were the basis and offered as a consideration for the contract, but also by specific inquiries and answers. Besides, the habit of drinking liquors to excess was manifestly material to the risk and the Court would have so declared even though the representation had been volunteered and not embodied in the contract or in answers to any inquiries.

The Court below should then have held that as matter of law, the representations made by the assured as set forth in the pleas were material and should have overruled the demurrers to the pleas.

Assignments Number Six, Seven, Eight and Thirteen.

These assignments are, *seriatim*, as follows:

Assignment six is:

"That the Court erred in sustaining the demurrer to the plea numbered 7, filed January 28, 1901."

The 7th plea referred to is on page 19 of transcript, and is as follows:

"7. That, in the application mentioned in the fourth plea containing the representations therein mentioned, the said Alexander S. Maclean was asked questions "9a" and questions "9b," to-wit:

"9a. Do you drink wine, spirits or malt liquors?"

"9b. If so, which of these, and to what extent?"

To the question "9a" he answered, "Yes." And to the question "9b" he answered, "Moderately."

The defendant avers that the said answer was not true, full, and complete, because, at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the life of the said Alexander S. Maclean."

Assignment seven is:

"7. That the Court erred in sustaining the demurrer to the plea numbered eight, filed January 28, 1901."

The plea numbered eight is in the transcript on page 20, and is as follows:

"That in the application mentioned in the fourth plea containing the representation mentioned, the said Alexander S. Maclean was asked question "9a" and question "9b," to-wit:

"9a. Do you drink wine, spirits or malt liquors?"

"9b. If so, which of these and to what extent?"

To the question "9a" he answered "yes." And to the question "9b" he answered "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made said answer, he had a habit of drinking spirits more than

moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean, because a knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the life of the said Alexander S. Maclean."

Assignment eight is as follows:

"8. That the Court erred in sustaining the demurrer to the plea numbered nine, filed January 28, 1901."

The plea numbered nine is on page 20 of the transcript, and is as follows:

"9. That, in the application mentioned in the fourth plea containing the representation therein mentioned the said Alexander S. Maclean was asked question "9a" and question "9b," to-wit:

"9a. Do you drink wines, spirits or malt liquors?"

"9b. If so, which of these, and to what extent?"

To the question "9a" he answered "Yes." And to the question "9b" he answered, "Moderately."

The defendant avers that the said answer was not true, full and complete, because at the time that he made the said answer, he had a habit of drinking spirits more than moderately, and that the existence or non-existence of the said habit was material to the risk assumed by defendant upon the life of the said Alexander S. Maclean because the existence of such habit tended to injure the health and shorten the life of the said Alexander S. Maclean."

The demurrer to these pleas are the same as those to plea number one heretofore discussed, and are on page 23, of transcript.

Assignment number thirteen is:

"13. That the Court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered nine, as set forth in the fifth exception of the bill of exceptions, to-wit:

"9. Any habit of drinking spirits by Maclean was material, if it was to such an extent that according to the course of practice of life insurance companies generally, it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

The seventh and eighth pleas and the ninth instruction

present the question in its subjective aspect, that is, its effect upon the mind of the insurers.

The seventh plea presents it as to the effect upon the mind of the insurers in the particular case.

The eighth plea presents it as to the effect upon the minds of careful and intelligent life insurance companies.

The ninth instruction in the thirteenth assignment of error presents it as the usual effect upon life insurance companies generally, according to the course of practice of such companies.

The ninth plea presents it in its objective aspect as an actual effect upon the subject of insurance, the life of the assured, such effect being judged of by the jury.

We are clear that the ninth plea did not present the proper definition of materiality, but it was offered because the Court had pronounced bad the pleas seven and eight, and we desired to present to it every phase.

The question as to what constitutes materiality has been touched upon so frequently in the cases hereinbefore cited by us, that we content ourselves with adding thereto the full and able discussion thereof and citation of authority by Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit. Under that decision, and we believe under the better decided cases, the seventh plea and the ninth instruction are good, and the Court erred in not so holding.

Provident Mutual, &c, vs. Mechanics, &c., 72 Fed. 423, 430.

Assignment Number Eighteen.

This assignment is as follows:

"18. That the Court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eleven, as set forth in the tenth exception of the bill of exceptions, to-wit:

"11. The Court instructs you that in cases where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury; and in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

The tenth exception therein referred to is on page 59.

It is too well settled to require citation of authority that when there is a direct representation of a fact by the assured, the assertion must be true, regardless of the belief or honesty of the insured in making such assertion. and if untrue, the policy will be avoided.

The Court below ignored this rule of law, however, and charged the jury in the instruction under consideration that they were "authorized to consider the reasonable understanding and belief of the assured."

In so doing, it clearly erred.

Assignment Number Twenty-Two.

This assignment is as follows:

"22. That the Court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered eighteen, as set forth in the fourteenth exception of the bill of exceptions, to-wit:

"18. The law is, and the Court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair and you have a right to infer that the company waived information upon that point."

The fourteenth exception referred to in this assignment is found on page 60 of the transcript.

The Court erred in giving this instruction:

Because, as we have seen upon a proper construction of the policy and the accompanying papers, there was no omission of the insurers to require an answer to any question from which could be iuferred a waiver of information, and

Because, it was for the Court and not for the jury to inspect and construe the policy and determine whether there was or was not a waiver.

Respectfully submitted,

W. A. BLOUNT,

Attorney for Plaintiff in Error.

APPENDIX.

CHAPTER 4173—(59.)

AN ACT in Relation to the Liability of Life Insurance Companies and Fire Insurance Companies in the State of Florida.

Be it Enacted by the Legislature of the State of Florida:

SECTION 1. That upon the rendition of a judgment or decree by any of the courts of this State against any life or fire insurance company, in favor of the holder or holders of any policy of insurance written by such company, there shall be adjudged or decreed against such insurance company, and in favor of the holder or holders of such policy, a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had.

SEC. 2. That the amount to be recovered for fees and compensation for attorneys and solicitors against life or fire insurance companies, as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies.

SEC. 3. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SEC. 4. That immediately upon the approval of this Act the Treasurer of the State shall send a copy of this Act to each fire insurance company doing business in this State.

Approved June 2, 1893.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 121.

HOME LIFE INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

A. A. FISHER, EXECUTOR, DEFENDANT IN ERROR.

Brief of Plaintiff in Error in Reply to the Contentions of the Defendant in Error.

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1. That the case was tried on pleas which presented substantially the same issues as were presented by the pleas stricken out upon demurrer.

2. That though there was error in sustaining demurrers to the pleas, yet it was without injury, because the court charged the jury as if the pleas were in the record, and therefore defendant obtained the same advantage as if the pleas had not been eliminated.

3. That the defendant deliberately withdrew pleas which presented substantially the same issues as the pleas stricken upon demurrer.

I.

This ground is not tenable as to the pleas in warranty.

These were the first plea (pages 17 and 18, Record), the third plea (page 18, Record), and the twenty-third plea (pages 36 and 37, Record), the sustaining of demurrers to which is assigned as error in assignments numbered 1, 2, and 3.

These were all pleas of breach of warranty, under which the defendant had no burden except proof of the literal falsity of the thing warranted.

The pleas upon which the case was tried were plea 17 (pages 25 and 26), plea 21 (page 33), and plea 26 (page 41). These were pleas of representation and alleged and required the defendant to prove not only the substantial falsity of the representation, but also the materiality of it, and that it induced the insurer to issue the policy.

Of course the plaintiff in error was injured by being compelled to assume burdens of proof which it would not have borne if its pleas of warranty had been sustained.

Nor is the ground true as to the pleas of representation.

These were pleas 4 (page 18), 6 (page 19), 7 (page 19), 8 (page 20), and 9 (page 20), the sustaining of demurrers to which is assigned as error in assignments 4, 5, 6, 7, and 8. They were pleas of misrepresentation, under which the defendant had to prove only that the representations were substantially false, and that they were material.

Pleas 17, 21, and 26, under which the case was tried, superadded to these the further allegation and required the further proof that the insurer was induced by the representation to issue the policy.

The court in sustaining demurrers to the pleas not con-

taining this latter allegation required the plaintiff in error to allege it, and thus to assume an additional burden of proof. This, of course, was injury.

Besides, pleas 1, 4, 7, 8, and 9, which were overruled, relied upon the falsity of the statement in the application that the assured only drank liquors *moderately*, while pleas 17, 21, and 26, upon which the trial was had, relied upon the untruth of other and distinct statements of the assured in the application and declaration to the medical examiners.

II.

This ground is not tenable.

We do not admit that in cases at law the court can, after having upon demurrer to pleas pronounced a certain defense bad at the trial, give a charge upon the assumption that such defense is in the record and is good, and thus cure the error. Such a contention ignores the necessary fact that attorneys prepare their cases upon the pleadings as settled by the court, and have no right to anticipate a change of front at the trial. Relying upon the status thus fixed and upon the manifest error committed by the court, the attorney for the defense in this case might well have prepared no evidence or less evidence under the pleas which were in at the trial than he would have done if his principal defense had not been taken away from him upon demurrer, and it cannot be permitted that a surprise and entrapping of this kind can be "a cure of error." In this connection the court will note that the evidence is not in the bill of exceptions, and therefore the court cannot tell whether the defendant developed its full case or whether it was induced by the action of the

court on the demurrers to forego a full development, and yet this court must find affirmatively in the record that the defendant was not so induced and was injured, for—

"It is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Vicksburg & Meridian Railroad Company *vs.* O'Brien, 119th U. S., page 103.

The court will also observe that the whole charge is not in the record, but only disjointed portions of it, and the court cannot, therefore, say how the portions relied upon to cure the error were themselves modified or controlled by other portions omitted from the record.

But it appears affirmatively that the error was not cured by the portion of the charge relied on, because it itself was inconsistent with and its effect nullified by other portions of the charge contained in the record.

The charge relied upon as giving the same advantage to plaintiff in error as if its plea of warranty had not been sustained is as follows:

"If you find either one to be true—that before McLean made application he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquors, you will find in this case for defendant." (Top of page 1, brief of defendant in error.) (I do not advert to the charges relied upon for the same purpose by defendant in error, and following on the same page, as they obviously relate only to the *quantum* of proof as to the habit of assured and do not purport to say that the mere finding of a habit would necessitate a verdict for defendant.)

The instruction quoted was unquestionably such an instruction as should have been given if a plea of warranty had been in the record; but

It was explicitly nullified by other instructions, and

It was inconsistent with almost all other portions of the charge.

It was nullified by the first charge requested by the defendant in error (ninth exception, page 58, Record), in which the court stated to the jury all the papers constituting and connected with the contract and concluded:

"The court instructs you in reference to those documents that there was no warranty made by McLean to the insurance company as to whether McLean drank wine, spirits or malt liquors, or to what extent he drank them."

It was nullified by the 13th, 14th, 15th, and 18th charges requested by defendant in error and given by the court (11th, 12th, 13th, and 14th exceptions, pages 59 and 60, Record), in which the court left it to the jury to say whether the insurer had not waived the truth of the answers made by the assured, and thus left it to the jury to say whether there was or was not a warranty.

It was inconsistent with and therefore nullified by almost every other instruction given by the court; for example, the 18th (page 48, Record), the 10th (page 52), the 12th, 13th, 14th, and 15th (page 55), the 20th (page 56), etc., etc., all of which are founded upon pleas found in the record, and in all of which the court substantially instructed the jury that for the insurer to establish its defense it was necessary to show not only the falsity of the statements of the assured, but also their materiality, and that they induced the issuance of the policy.

Of course, the submission of these issues to the jury was incompatible with any subsisting defense of warranty, and the jury could only understand that they could not find for the defendant unless they found that any representations made were material to the risk and constituted the inducement to issue the policy.

Not only, therefore, does the defendant in error fail to show that the error of the court in sustaining the demurrers to the pleas was cured by the charge quoted by them, but a consideration of these very charges show that they were inconsistent with themselves, and so misleading as to confuse the jury and prevent their arriving at an intelligent verdict. This furnished in itself a substantive ground for reversal.

Bank of Metropolis *vs.* Bank of New England, 6th Howard, 212.

III.

Nor is this ground tenable.

While the plaintiff in error did withdraw pleas 16 (page 22), 18, 19, and 20 (pages 26 and 27), as stated by counsel for defendant in error (Brief, pages 12, 13, and 14), and while each of these pleas contained some of the averments contained in the pleas pronounced bad on demurrer, yet none of them were equivalent to any of those, for each of them contained additional averments, and thus would have required additional proof.

Thus 16, 18, and 20 contained an allegation that "McLean knew of the habit and believed the same to be material." The 16th alleged that "he fraudulently withheld

knowledge" from the defendant, and the 19th, 20th, and 22d alleged that the defendant was induced to issue the policy by the representations of McLean, and that such representations were material in three specified ways. It cannot be contended, even plausibly, that because the plaintiff in error refused to put upon itself these additional burdens of proof, which the court erroneously required it to assume, it is estopped from insisting that the pleas contained therein were good.

Respectfully submitted.

W. A. BLOUNT,
Attorney for Plaintiff in Error.

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Supreme Court, U.S.
FILED
DEC 15 1902
JAMES H. MCKENNEY,
Clerk.

In United States Supreme Court,

October Term, 1902.

No. 121.

THE HOME LIFE INSURANCE COMPANY, of New York, Plaintiff in Error,

vs.

A. A. FISHER, as Executor of the last will and testament of Alexander Sutter MacLean, Deceased, Defendant in Error.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of Defendant in Error.

W. H. Hart, Printer, Jacksonville, Fla.

In United States Supreme Court,

October Term, 1902.

No. 121.

THE HOME LIFE INSURANCE COMPANY, OF NEW YORK, PLAINTIFF IN ERROR.

vs.

A. A. FISHER, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALEXANDER SUTER MACLEAN, DEFENDANT IN ERROR.

In Error to United States Circuit Court for the Northern District of Florida, at Pensacola.

Brief of Defendant in Error.

STATEMENT.

Defendant in Error, as Executor of the last will and testament of Alexander Suter McLean, sued the Plaintiff in Error upon a policy of insurance upon the life of his testator.

Defendant in Error recovered a verdict and judgment, for the reversal of which Plaintiff in Error sues out its writ of error.

The policy sued on, together with the application, options and conditions, are made parts of the declaration and are set out in the printed transcript at pages 4. *et seq.*; and declaration to the medical examiner and his report are made part of the amendment to the declaration in the case, and are set out at pages 11, *et seq.*

The Insurance Company filed a great number of pleas, but "withdrawing all former pleas," (p. 17) pleaded (pp. 17 to 22) sixteen pleas, numbered from 1 to 16, and afterwards (pp. 25 and 26) filed pleas numbered 17, 18, 19 and 20,

and also further pleas (p. 33,) 21 and 22, and (pp. 41 and 42,) plea 26, and (p. 45,) plea 27.

Demurrers were sustained to pleas 1 to 15, inclusive, and 23 to 25 inclusive.

Pleas 16, 18, 19, 20 and 22 were withdrawn, (p. 43.)

The case went to trial on pleas 17, 21, 26 and 27.

Plea 27 was filed pending the trial, when defendant in error withdrew his amendment to the declaration (p. 43,) whereby certain conditions, which were involved in demurrers which had been sustained to pleas, were removed from the pleadings and brought in by way of evidence at the trial.

The errors assigned and now insisted upon involve certain of the pleas overruled, on demurrer, while the amendment of the declaration was in as a part of the pleadings, and certain instructions which the plaintiff in error requested, but were refused by the court, and certain instructions which, upon the request of defendant in error, were given to the jury by the court.

Plaintiff in Error has informed us, by its attorney, that it will only insist on assignments upon certain of the errors assigned, to-wit:

Assignment No. 1.

That the court erred in sustaining the demurrer to the plea numbered 1, filed January 28, 1901.

Assignment No. 2.

That the court erred in sustaining the demurrer to the plea numbered 3, filed January 28, 1901.

Assignment No. 3.

That the court erred in sustaining the demurrer to the plea numbered 23, filed March 15, 1901.

Assignment No. 4.

That the court erred in sustaining the demurrer to the plea numbered 4, filed January 28, 1901.

Assignment No. 5.

That the court erred in sustaining the demurrer to the plea numbered 6, filed January 28, 1901.

Assignment No. 6.

That the court erred in sustaining the demurrer to the plea numbered 7, filed January 28, 1901.

Assignment No. 7.

That the court erred in sustaining the demurrer to the plea numbered 8, filed January 28, 1901.

Assignment No. 8.

That the court erred in sustaining the demurrer to the plea numbered 9, filed January 28, 1901.

Assignment No. 9.

That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorney's fees in this case, as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions.

Assignment No. 13.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered 9, as set forth in the fifth exception of the bill of exceptions, to-wit: "9. Any habit of drinking spirits by McLean was material if it was to such an extent that according to the course of practice of life insurance companies generally it would have led to the rejection of the risk if it had been made known to defendant before the issuance of the policy."

Assignment No. 14.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 11, as set forth in the 6th exception of the bill of exceptions, to-wit: "11. You will find from the evidence that the defendant was induced by the representations of A. S. McLean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon."

Assignment No. 15.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 16, as set forth in the 7th exception of the bill of exceptions, to-wit: "16. The plaintiff has not proved his replication, to-wit: That the defendant informed McLean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner; and informed him that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said McLean; and that the said McLean understood and had reason to understand that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing, McLean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts."

Assignment No. 18.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff numbered 11, as set forth in the 10th exception of the bill of exceptions, to-wit: "11. The court instructs you that in cases where the question of temperance or intemperance is involved there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury, and in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

Assignment No. 22.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 18, as set forth in the 14th exception of the bill of exceptions, to-wit: "18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in con-

nection therewith, it is fair, and you have right to infer that the company waived information upon that point."

Assignment No. 23.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 28, as set forth in the 15th exception of the bill of exceptions, to-wit: "28. If you find that the habits of Alexander Suter McLean, the assured, in the usual, ordinary and every day routine of his life were temperate, then the representations made by him in his application to the medical examiner were not untrue within the meaning of the conditions upon which the policy sued upon was issued."

In discussing the assignments based on rulings on the pleas, we will endeavor to follow, for the convenience of the court, the grouping of pleadings as made by attorneys for plaintiff in error, taking these groups up in order. Before doing so, we present below a statement of the facts as found in the declaration and amendment and exhibits "A" and "B," which the legal effect of the pleas demurred to was to admit, and were hence regarded by the court as admissions of record to be used in reaching a conclusion upon the demurrers to the pleas. Upon such demurrers, and each of them, the court has before it as follows:

(1.) The general allegations of the declaration as to the making of the policy sued on, the death of the insured and appointment of defendant in error as executor of his last will and testament, (p. 3.)

(2.) The policy of insurance (p. 4,) reciting that "the options, benefits and conditions printed or written by the said company upon the back of this policy are a part of this contract as fully as if they were recited at length over the signatures hereto affixed."

(3.) The following questions and answers in the application, (p. 8:)

"9a. Do you drink wine, spirits or malt liquors?" a. Yes."

"9b. If so, which of these and to what extent?" b. Moderately."

"9c. Have you ever used them freely or to excess? c. No."

And in the same application (p. 9,) the following:

"I warrant, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, that all of the foregoing statements and answers are true, full and complete, whether written by my own hand or not, and are offered to the company, together with those contained in the declaration to the Home Life Insurance Company's Medical Examiner, as a consideration for and as the basis of the contract with said company under any policy issued under this application."

(4.) Declaration by deceased to the company's medical examiner, wherein (pp. 13 and 14,) occurred the following:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

"14a. No habit of drinking liquors."

"b. If so, which of these and to what extent daily?"

"b. ..... (not answered.)

"Note. State the daily amount General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

"c. Have you ever used them freely or to excess?"

"c. No."

(5.) Medical Examiner's report, wherein (pp. 15 and 16) are the following:

"3a. Has he the appearance of a person addicted to the use of stimulants?

"a. No."

"15a. Have you reviewed the answers as set down on the two sides of this sheet to make sure that the same are correct, and that every question has some answer? Please see that all erasures and corrections are properly initialed."

"a. Yes."

"b. Have you examined the accompanying application and verified the statements therein recorded? Please see that the signatures to the application and declarations are alike, and that the date of the application is inserted in the place provided for it on the other side of this sheet.

"b. Yes."

And the additional remark of the medical examiner on

page 17. "His condition is exceptionally good, as you will see from the foregoing report."

(6.) Approval of the medical examiner's report by the decision of the medical director of the company (p. 17,) thus: "Approved August 31, 1899, F. W. Chapin, Medical Director."

This court will find, upon examining the assignments now insisted upon, that in so far as the pleas to which demurrers were sustained are concerned:

(1.) They are not good in law.

(2.) The same defence was set up in other pleas afterwards filed, to which demurrers were not interposed.

(3.) The same defense was set up in subsequent pleas, upon which issues were made or tendered, and which were voluntarily withdrawn by the company before trial, and,

(4.) Instructions were given to the jury that fully covered, in a manner favorable to the company, the substance of the defenses set up in the overruled pleas.

The court will find, in reference to the instructions asked for by the company and refused, that they were

(1.) Properly refused.

(2.) The substance of them was given in other instructions.

And, as to instructions given at the request of defendant in error, the court will find,

(1.) That they were properly given.

(2.) That other instructions given made the giving of them harmless error, if erroneous.

Plaintiff in error places in its first group pleas 1, 2, 3 and 23, which allege that the testator, McLean, in his application for the policy in suit, made certain statements which were warranties.

1. There is no warranty contained *in this policy*. No words of warranty occur in it, but only in the *application* for insurance.

In Moulor vs. Am. Life Ins. Co., 111 U. S., 335, this court stated the law to be such as to preclude the idea of the policy in the present case being taken as *warranting* the answers made to questions in the application for insurance and declaration made by the assured to the medical examiner.

In that case there was in the application, among other things, the following:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions."

And the policy recited:

"It is hereby declared and agreed that if the representations and answers made to this company on the application for this policy upon the full faith of which it is issued shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in every such case, the policy shall be null and void."

This court said in its opinion, page 342:

"We have seen that the *application* contains a stipulation that it shall form a part of the contract of insurance; also that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, or what was the intention of the parties. Taken together it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth in every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact literal fulfillment of all the declarations embodied in the application. It is true that the word 'warranty' is in the application, and although the contract might be so framed as to impose upon the insured the obligation of a strict warranty without introducing into it that particular word, yet it is a fact not without some significance that the word was not carried forward into the policy, the terms of which control when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as *representations*. Thus we have one part of a contract apparently stipulating for a warranty, while another part describes the

statements of the assured as representations. The doubt as to the intention of the parties, must, according to settled doctrines of the law of insurance, recognized in all the adjudged cases, be solved against the party whose language it becomes necessary to interpret. The construction must therefore prevail which protects the insured against obligations arising from a strict warranty."

In the present case the policy recites, (p. 4,) that it is made "in consideration of the *statements and agreements* made in the application for this policy."

And besides that, it is only necessary to look at portions of the application for insurance, (pp. 8 and 9,) portions of the declaration made to the medical examiner, (pp. 13 and 14,) and the medical examiner's report, (pp. 15 to 17,) to ascertain that it was not the intention either of the insured or of the insurer that the deceased intended to warrant the absolute truth of the *statements* made by him. In the application accompanying the policy this occurs:

9a. Do you drink wine, spirits or malt liquors? a. Yes.

9b. If so, how much of them, and to what extent? b. *Moderately.*

It is too plain for argument that the intention of the assured in this was to admit that he did drink wine, spirits or malt liquors, and to such an extent as *in his opinion* made him a *moderate drinker.*

In his declaration to the medical examiner of the company, the following occurs:

"14a. Do you drink wine, spirits or malt liquors daily or habitually?"

"a. No habit of drinking liquors.

"14b. If so, which of them and to what extent daily?"

"b. .... (not answered.)

"Note. State the daily amount. General terms such as "temperately," "moderately," "occasionally," will not be accepted and will necessitate correspondence."

"14c. Have you ever used them freely or to excess?"

"c. No."

From this it is very clear that the deceased intended that his statements should be taken and construed in connection with what he had already stated in his application. He had there said that he drank *moderately.* He here says that he has *no habit* of drinking liquors. By these two statements before the insurance company at the same time

it must have been intended, and the company ought to have understood, that the applicant meant that he was a moderate drinker of liquors, but that in his opinion that drinking did not constitute a habit. Whether it constituted a habit or not in the estimation of the company would have been ascertained by requiring the applicant to answer the question 14b, but this appears not to have been insisted upon. It was not answered, and that, notwithstanding the question was immediately followed by the note informing the applicant that he must state the daily amount which he drank, and that general terms descriptive of the extent of his drinking would not be accepted and would necessitate *correspondence*.

Having *that* in mind the applicant, when pressed with the further question, 14c. Have you ever used them freely or to excess? answered "No," reasonably understanding that his own estimate of his habits was all that the company would require of him, and that if it desired to obtain further information it would do so by means of "correspondence," and not in *reliance upon* any statement, representation or warranty of his. That such was the purpose of the insurance company is perfectly plain from what afterwards appears in the medical examiner's report, in which he says that the applicant did not have the appearance of one addicted to stimulants, and that there was nothing about him to suggest that he had ever led other than a sober and temperate life, followed by the remark made by the medical examiner that his "condition is exceptionally good, as you will see from the foregoing report."

In the case of Phœnix Ins. Co. vs. Raddin, 120 U. S., 190, this court said:

"When upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want of imperfection in the answer and render the omission to answer more fully immaterial."

"The four interrogatories grouped together in one question and all relating to the same subject, would naturally be understood as all tending to one object."

"The legal effect of issuing a policy upon the answer as it stood, was to waive their right to require further answers as to the particulars mentioned, and to determine that it was immaterial for the purpose of their contract."

"The insurers, thus having conclusively elected to treat the omission as immaterial, could not afterwards make it material by proving that it was intentional."

In Mut. Res. Fund Assn., 47 S. W., 850, the court said:

"An insurance company cannot claim that the policy is void because the insured suppressed facts by failing to make an answer to certain questions in his application when the application was received by the insurer without any objection"

In Liberty Hall Assn. vs. Housatonic Mut. Fire Ins. Co., 7 Gray, 261, the court said:

"A waiver of the right to any information upon matters inquired of in one of the interrogatories to an applicant for insurance, may be inferred from the issuing of a policy upon an application in which this interrogatory is unanswered, although the applicant has answered in the negative another interrogatory, whether 'there are any other circumstances affecting the risk.'"

And the general rule of law is, "that conditions and provisos must be strictly construed against the insurers, because they have for their object to limit the scope and defeat the purpose of the principal contract, and as the insurer prepares the contract and furnishes the language used, any ambiguity in the contract must be taken most strongly against him."

Dilliber vs. Home Life Ins. Co., 69 N. Y., 256;
1 May on Ins. Sec. 176.

What we have here said meets any contention that the plea is good, even though the court should find that there is no technical warranty shown, upon the ground that the representations made were untrue in respect of *matters material to the risk*. A contention some what like that was made in Moulor vs. Am. Life Ins. Co, *supra*, 343, in reference to which this court said:

"But it is contended that if the answers of the assured are to be deemed representations only, the policy was nevertheless forfeited if those representations were untrue in respect of any matters material to the risk."

The court then proceeded to dispose of the contention, as we have just undertaken to do.

But plaintiff in error cannot complain that demurrers to these pleas were sustained to his prejudice, because the court gave to the plaintiff in error the full benefit of all that

he could have obtained under the said pleas by the following instruction found in the 3rd exception, p. 47, to-wit:

"If you find either one to be true, that before McLean made application he drank liquor either freely or to excess, or at the time that he made the application he had a habit of drinking liquor, you will find in this case for the defendant."

And, again, "the defendant, under the pleadings, is required to prove either that A. S. McLean had before the making of the application, to-wit: August 22, 1899, a habit of drinking freely, or a habit of drinking spirits to excess, or had at the time of his statement to the medical examiner, to-wit: August 24, 1899, a habit of drinking spirits But it is not necessary that the defendant should prove the existence of more than one of these habits."

And, again, "it is not necessary, in order that you may find for the defendant, that you should find that McLean ever drank spirits freely or to excess. It is only necessary as to the extent of the drinking that you should find that he had at the time of his application a habit of drinking spirits."

And in the same direction the court gave, at the request of the plaintiff in error, instructions 12, 13, 14, 15, 18, 19 and 20, (pp. 55 and 56.)

Plaintiff in error places in its second group pleas 4 and 6, which allege that the testator, McLean, in said application made certain statements which were representations which were material to the risk assumed by plaintiff in error in issuing the policy, and which were untrue.

And in its third group it places the 7th, 8th and 9th pleas, which were like the 4th and 6th except that they allege the manner in which the repsesentation were material.

1. The authorities cited above and argument there made apply fully to the pleas embraced in these two groups, and need not be repeated.

2. Until the beginning of the trial of the case plaintiff in error had in, with issues made upon them, plea numbered 16, (p. 22,) alleging that McLean had a habit of drinking spirits to excess, that said habit was material to the risk to be assumed by the defendant, because the existence of such habit would tend to injure the health and shorten the life of the said McLean, and that the said Mc-

Lean knew of the existence of the said habit, and believing the same to be material to the said risk he fraudulently withheld the knowledge of such fact from the defendant;

and plea numbered 18, alleging "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of, the making of the said answer he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy, and that at the time of the making of the said answer the said McLean knew of the existence of the said habit and believed the same to be material to the risk;"

and plea numbered 19, (p. 26,) alleging, "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of, making the said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life, that the existence of such habit tended to injure the health and shorten the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy;"

and plea numbered 20, (pp. 26 and 27,) alleging, "that the said answer to the said question 9c was not full and complete, because prior to, and at the time of making the said answer, he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue the policy of insurance upon the said life. That the knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or refuse to issue a policy of insurance on the said life. That the existence of such habit tended to injure the health and shorten

the life of the said Alexander S. McLean, and that the said McLean knew at the time of making said answer of the existence of the said habit, and believed the same to be material to the said risk, and that the said defendant was induced by the answer of the said McLean to issue the said policy;"

and plea numbered 22, (p. 33,) alleging, "that the said answer to the said question 9c was not true, full and complete, because prior to, and at the time of making the said answer he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, that the knowledge of such existence or non-existence would have materially influenced the judgment of the defendant in determining whether it would or would not issue a policy of insurance upon the said life. That the knowledge of such existence would materially influence careful and intelligent life insurance companies in determining whether to issue or to refuse to issue a policy of insurance on the said life. That the existence of such habit tended to injure the health and shorten the life of said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy"

Now, it is perfectly apparent by a comparison of the pleas which were overruled upon demurrer and included in the said groups 2 and 3, that if it be that, in law, those pleas or any of them constitute a defense, every allegation of them and every defense in them set up is contained in at least one of the pleas, 16, 18, 19, 20 and 22, upon which plaintiff in error had an opportunity to go before the jury, and which were in fact in, with issues made upon them, at the time when the trial of the case was commenced. Yet, with this opportunity to present such issues upon such pleas to the jury, plaintiff in error deliberately withdrew them. Under such circumstances it must be that plaintiff in error has abandoned the right to assign error on account of the court below sustaining demurrer to pleas 1 to 15 and 23 to 25.

3. But, in addition to the position just taken, the trial was proceeded with upon issues made upon pleas 17, 21 and 26.

Plea number 17, (pp. 25 and 26,) alleged, "that the said

answer to the said question 9c was not true, full and complete because prior to, and at the time of, making the said answer he had a habit of using spirits freely, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Plea number 21, (p. 33,) alleges, "that the said answer to the said question was not true, full and complete, because prior to, and at the time of, making said answer he had a habit of using spirits to excess, and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said Alexander Suter McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Plea number 26, (p. 41,) alleges, "that the said answer was not true, because the said A. S. McLean did have at the time of making the same a habit of drinking liquors, to-wit, spirits; and that the existence or non-existence of the said habit was material to the risk assumed by the defendant upon the life of the said A. S. McLean, and that the defendant was induced by the said answer of the said McLean to issue the said policy."

Upon all of these pleas issues were made and submitted to the jury, and it will be observed by a comparison of them with the pleas that were overruled upon demurrer, that upon them substantially the same issues could be made, and were made, for the jury, as could have been made upon those that were overruled.

4. Instructions given by the court substantially submitted to the jury in a way favorable to plaintiff in error all of the questions and contentions raised or intended to be raised by the overruled pleas.

See instructions 6 and 7, (pp. 47 and 48,) and instructions 12, 13, 14, 15, 18, 19 and 20 (pp. 55 and 56.)

It is a well settled rule in this court, as well as in every other court, that no judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the right of the party against whom the ruling was made.

Lancaster vs. Collins, 115 U. S. 222.

Defendant is not prejudiced by the sustaining of demurrer

to the plea or answer if he has other pleas or answer under which he could introduce any evidence that would have been admissible under that demurred to.

Pollock vs. Brush Elec. Assn 128 U. S. 446;
Hudmon vs. Cuyas, 57 Fed. 355.

Defendant is not injured by sustaining a demurrer to a cross bill where it appeared that the court treated the allegations thereof as before it, applied the evidence and held that they were not sustained.

Lloyd vs. Preston, 146 U. S. 630.

The sustaining of a demurrer to a valid plea is not reversible error when another plea is admitted which includes all the matter alleged in the first plea and lets in all the proofs sought to be introduced under the first plea.

Hudmon vs. Cuyas, 57 Fed. 355.

Where an answer has been stricken out but the defendant has been permitted to put in his evidence as if it remained, even if the order striking out the answer was erroneous, it was harmless.

County of Nemeha vs. Frank, 120 U. S. 41.

Striking out pleas to the declaration is not prejudicial where evidence competent under them would have been equally competent under other pleas.

Sup. Council Cath. K. of A. vs. Fidelity & Casualty Co. 63 Fed. 48.

The foregoing covers assignments of error numbered 1, 2, 3, 4, 5, 6, 7 and 8.

Assignment of Error No. 9.

"That the court erred in permitting the witness, John Eagan, to testify as to what would be a reasonable fee for the plaintiff to recover as his attorneys' fees in this cause as a basis for such recovery against the defendant, as set forth in the first exception of the bill of exceptions."

This assignment covers the action of the Circuit Court, upon which the plaintiff in error relies as the basis of his right to prosecute his appeal directly to this court. Without that the case would not have come here. This court has already disposed finally of the question involved in this assignment in the case of Fid. Mut. Life Assn. vs. Mettler, 185 U. S. 308. We do not deem it necessary, or proper, to

argue the assignment. The statute relied on by defendant in error is this:

CHAPTER 4173—(59.)

AN ACT in Relation to the Liability of Life Insurance Companies and Fire Insurance Companies in the State of Florida.

Be it Enacted by the Legislature of the State of Florida:

SECTION 1. That upon the rendition of a judgment or decree by any of the courts of this State against any life or fire insurance company, in favor of the holder or holders of any policy of insurance written by such company, there shall be adjudged or decreed against such insurance company, and in favor of the holder or holders of such policy, a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had.

SEC. 2. That the amount to be recovered for fees and compensation for attorneys and solicitors against life or fire insurance companies, as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies.

SEC. 3. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SEC. 4. That immediately upon the approval of this Act the Treasurer of the State shall send a copy of this Act to each fire insurance company doing business in this State.

Approved June 2, 1893.

Assignment of Error No. 13.

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant, numbered 9, as set forth in the 5th exception of the bill of exceptions, to-wit: '9. A habit of drinking spirits by McLean was material if it was to such an extent that according to the course of practice of life insurance companies generally it would have led to the rejection of the risk if it had been made known to the defendant before the issuance of of the policy."

1. We do not think that the instruction prayed for

should have been given. There are all kinds, qualities and degrees of life insurance companies, and it might well be that what would be generally insisted upon by most of them would not be such as would be regarded as a reasonable demand by leading and first class companies. If the principle contended for has any support at all, it would only be to the extent that the demand should be such as would seem to be reasonable in the estimation of, and be consistently insisted upon, by insurance companies of leading position and character.

In order that the rule invoked by this instruction be given to the jury to guide it in its deliberations, it should be qualified so as to provide that the rule should be reasonable and fair. The instruction asked for and refused would make any habit of drinking spirits, even though it might involve the drinking of only one glass a day or every other day, without possibility of any injury to the health resulting, suffice to defeat the action, if the rule be as stated in the instruction.

2. Plaintiff in error was not injured by the refusal to give the instruction, because the court did give, as set out in the 5th exception, instruction 8, to-wit: "The pleadings admit that the said A. S. McLean made the representations charged in the pleas, to-wit: The representation that he had not before August 22, 1899, had a habit of drinking spirits freely, or a habit of drinking spirits to excess, and the defendant has proved that such representations were material to the risk to be assumed by the defendant, so that you will find that such representations were made, and that they were material to the risk."

Assignment of Error No. 14.

"That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 11, as set forth in the 6th exception of the bill of exceptions, to-wit: '11. You will find from the evidence that the defendant was induced by the representations of A. S. McLean that he had never used spirits freely or to excess, and that he did not have a habit of drinking liquors, to issue the policy sued upon.'"

1. The court properly denied this instruction because it had before it, as admitted, the statements made by the

assured in his application for insurance, his declaration to the medical examiner of the insurance company, the medical examiner's report, and the approval of the risk by the medical director of the company, all of which has been above fully set forth. The court evidently was of opinion that the manner in which the questions involved were answered, or the answers thereto waived, the apparent understanding between the assured and the company's agent as to the company having the right and intending to prosecute other inquiries in reference to the habits of the assured, was unwilling to compel the jury to find that the action of the insurance company was induced solely by the representations of McLean, and to compel the jury to find that the unqualified representation of McLean was that he never used spirits freely or to excess, and that he did not have any habit at all of drinking liquors. Had the court given the instruction. as prayed for, it would have been clearly erroneous, because in it was embraced the assertion that McLean stated to the insurance company "that he did not have a habit of drinking liquors," whereas the evidence shows without contradiction that he stated to the company that he did drink liquors, and that he did drink them moderately, from which it necessarily followed that he informed the company that he had a habit of drinking liquors "moderately."

2. Should the court find that the instruction denied was a proper expression of the law, it will also find that plaintiff in error was not injured by the refusal of the court below to give such instruction, because the court did give instructions 12, 13, 14, 15, 18, 19 and 20, set forth in the 6th exception, which stated the law as strongly in favor of plaintiff in error as could have been reasonably desired.

Assignment of Error No. 15.

That the court erred in refusing to deliver in charge to the jury the special instruction asked by the defendant numbered 16, as set forth in the 7th exception of the bill of exceptions, to-wit: "16. The plaintiff has not proved his replication, to-wit, 'that the defendant informed McLean that it would not issue the policy upon statements made by him in his application, or upon statements made by him in his declaration to the defendant's medical examiner; and

informed him that if the said policy was issued, as applied for, it would be issued upon information acquired by the defendant of persons and sources other than the said McLean, and that the said McLean understood, and had reason to understand, that the policy which was delivered to him was not based upon any statement or representation made by him either in the application or the declaration to the medical examiner, or otherwise, and that so believing McLean accepted the policy and paid premiums thereon, and you will therefore find that the plaintiff has not proved the said facts."

1. This instruction ought not to have been given and was correctly refused, because, the jury having before it the application for insurance and the declaration to the medical examiner, had a right to infer, and the court was willing for them to infer, that when the company consented to deliver the policy to the deceased, notwithstanding his failure to answer one material question propounded to him, and notwithstanding the information conveyed to him in the "note" as to the consequence that would result from his not answering fully and definitely, the policy would be issued upon information acquired from other sources, and that he had a reason to so understand, and that so believing he accepted the policy and paid the premiums.

2. Plaintiff in error had the full benefit of all that could be reasonably exacted through the instruction denied, by the giving of instruction 17, set forth in the 7th exception, to-wit: "If you find that the defendant, before it issued the policy sued on, notified the said McLean that the policy would not be issued on the basis of a declaration made by him in reference to the extent of his habitual indulgence in the use of spiritual liquors, then you must find for the plaintiff. The plaintiff, however, must prove such notification, and he must prove it by evidence outside of anything contained in the policy, application, statement to the medical examiner and the medical examiner's report. There is nothing in these papers, singly or taken together, which shows, or tends to show, any such notification."

3. The instruction 16, which was denied, is in legal effect so nearly identical with instruction 17, just recited, and which was given at the request of the plaintiff in error, that the court below was justified in refusing to give the former, even if it embodied correct law.

Assignment of Error No. 18.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 11, as set forth in the 10th exception of the bill of exceptions, to-wit: "11. The court instructs you that in a case where the question of temperance or intemperance is involved, there is no sharp line of distinction, and in reference to that much is left to the discretion and judgment of the jury. And in connection therewith the jury is authorized to consider the reasonable understanding and the belief of the assured."

This instruction embodies a correct proposition of law, applicable to the case before the court.

I May on Ins. Sec. 299, p. 609;
3 Joice on Ins. Sec. 2097;
Moulor vs. Ins. Co. 101 U. S. 708;
Bissler vs. Am. Ins. Co. 51 S. W. Rep. 755;
Fitch vs. Ins. Co. 59 N. Y. 557;
Knickerbocker Life Ins. Co. vs. Foley, 105 U. S. 350;
Mut. Res. L. Assn. vs. Farmer, 47 S. W. 850.

Assignment of Error No. 22.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff, numbered 18, as set forth in the 14th exception of the bill of exceptions, to-wit: "18. The law is, and the court so instructs you, that when an insurance company issues a policy without requiring an answer to an interrogatory contained in the application or declaration made in connection therewith, it is fair, and you have a right to infer, that the company waived information on that point."

This also embodies a correct proposition of law.

L. H. Assn. vs. Ins. Co. 7 Gray, (Mass.) 265;
Swick vs. Home Life Ins. Co. 2 Dillon, 165;
Phœnix Life Ins. Co. vs. Raddin, 120 U. S. 183;
Moulor vs. Ins. Co. 101 U. S. 708.

Assignment of Error No. 23.

That the court erred in delivering in charge to the jury the following special instruction requested by the plaintiff,

numbered 28, as set forth in the 15th exception of the bill of exceptions: "28. If you find that the habits of Alexander S. McLean, the assured, in the usual, ordinary and every day routine of his life were temperate then the representations made by him in his application and to the medical examiner were not untrue within the meaning of the conditions upon which the policy sued upon was issued."

By reference to the 15th exception it will be seen that "there was testimony to prove that McLean was, in the usual, ordinary and every day routine of his life temperate in his habits, and there was testimony tending to prove the contrary." Under such conditions the instruction was legal and proper.

Knickerbocker L. Ins. Co. vs. Foley, 105 U. S. 350;
1 May on Ins. Sec. 299, p. 609.

Respectfully submitted,

Rich'd R. McMahon.
Jno C. Avery.
Benj. C. Tanner.

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 121.—October Term, 1902.

The Home Life Insurance Company of New York, Plaintiff in Error, vs. A. A. Fisher, as Executor of the Estate of Alexander Suter Maclean, deceased.	In error to the Circuit Court of the United States for the Northern District of Florida.

[February 23, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action on a policy of life insurance, brought in the United States Circuit Court. The policy was taken out by one Maclean, the plaintiff's testator, on his own life. By a statute of Florida, if the plaintiff recovered, reasonable attorneys' fees were to be found by the jury and added to the judgment. Evidence was offered as to the proper fee, and was objected to on the ground that the statute was contrary to the Fourteenth Amendment. The evidence was admitted subject to exception, the plaintiff got a verdict and judgment, and the case was brought here by writ of error.

In view of the decision in *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, the assignment of error in the ruling just stated is not pressed. But although it was that on which the case came up and which gives us jurisdiction, other errors are assigned, which are relied upon and which we must consider. *Horner* v. *United States*, No. 2, 143 U. S. 570, 577.

The policy purports to be made "in consideration of the statements and agreements made in the application for this policy, which are hereby made a part of this contract." The application "warrants" that the statements in it "are true, full and complete, . . . and are offered to the company, together with those contained in the declaration to the Home Life Insurance Company's medical examiner, as a consideration for, and as the basis of the contract with said company." The application contained the following questions and answers: "Q. Do you drink wine, spirits, or malt liquors? A. Yes. Q. If so, which of these, and to what extent? A. Moderately. Q. Have you ever used them freely or to excess? A. No." The declaration to the medical examiner contained the following questions and answers: "Q. Do you drink wine, spirits, or malt liquors, daily or habitually? A. No habit of drinking liquors. Q. If so, which of these, and to what extent daily? Note.—State the daily amount.

General terms, such as temperately, 'moderately,' 'occasionally,' will not be accepted, and will necessitate correspondence." The second of these questions was not answered. The defendant, with superfluous multiplicity of pleas, set up that these answers were warranties, and again that they were material representations, and that they were false.

Demurrers to the pleas of breach of warranty and some pleas of false representation were sustained, mainly we presume on the authority of *Moulor* v. *American Life Insurance Co.*, 111 U. S. 335. So far as the declarations to the medical examiner are concerned, it will be seen that the word "warrant" does not extend to them. Grammatically, the meaning of the sentence, as it stands, is that the applicant warrants the statements in the application, and warrants that they are offered to the company, together with those in the declaration to the medical examiner, as the basis of the contract. If the sentence is taken a little more intelligently, we should assume that the word "they" has dropped out between "and" and "are offered," and that "warrant" does not govern that part of the clause. However read, the meaning is the same. With regard to the answer in the application, denying that the applicant ever had used spirits, &c., to excess, the strong language of the policy, making the application "part of the contract," affords ground for argument, at least, that the authority cited does not apply, and that this answer was warranted by the assured. But it is not necessary to decide that question in view of the trial and the subsequent ruling of the court.

The case went to trial on the seventeenth, twenty-first, twenty-sixth and twenty-seventh pleas. The seventeenth set up the last-mentioned answer, denying the use of spirits freely or to excess, and averred that it was material, induced the issuing of the policy, and was false in that the applicant had a habit of using spirits freely. The twenty-first was similar, except that the falsity alleged was that the applicant used spirits to excess. The twenty-sixth set up the answers to the medical examiner; averred that the applicant did have a habit of drinking spirits; that the answer was material, and induced the making of the policy. The twenty-seventh plea was *non assumpsit*. Thus it will be seen that the facts relied on in the pleas held bad were in issue before the jury. This being so, it is questionable whether the plaintiff in error could complain, unless it could point out a mistaken instruction with regard to them at the trial. *Pollak* v. *Brush Electric Association of St. Louis*, 128 U. S. 446, 452, 453; *Lloyd* v. *Preston*, 146 U. S. 630, 644; *Hudmon* v. *Cuyas*, 57 Fed. Rep. 355, 358, 360. Clearly, if, under proper instructions, the jury found the facts not to be as charged, the plaintiff in error suffered no wrong. That was what happened in this case.

The jury were instructed that, if they found "either one to be true, that before Maclean made application, he drank liquors either freely or to ex-

cess, or at the time that he made the application he had a habit of drinking liquor," they were to find for the defendant, the declaration to the medical examiner thus being put upon the same footing as the application. The jury found for the plaintiff. Therefore they must be taken to have found categorically that no one of the supposed facts was true, or, in other words, that all of the above recited answers were correct. If so, it does not matter whether they were warranties or not. There is a suggestion, to be sure, that, in the latter case, the defendant would have had to prove only the "literal" falsity of the statement, whereas, in the other, proof of its substantial falsity was required. *Phoenix Life Insurance Co.* v. *Raddin*, 120 U. S. 183, 189. But the plain question of fact was put to the jury with no such niceties of discrimination. They found a plain answer, and the distinction comes too late now. It is said, also, that the charge in other parts did away with the requirement which we have quoted, and that, under the pleas of misrepresentation, the defendant had the burden of proving other facts. It does not appear to us that the requirement was done away with. On the contrary, it was reiterated. The burden of proving other facts was largely cut down by further instructions unnecessary to repeat, and the burden of proving them did the defendant no harm when the jury found as they did with regard to Maclean's drinking. The alleged warranty that he drank moderately was satisfied by the findings, apart from other answers to the point made with regard to that. We see no reason to assume that the defendant was taken by surprise by the rulings in its favor and put in less evidence than it would have put in had the demurrers been overruled.

We see no ground for reversing the judgment in the other instructions to the jury. Moreover, the other questions raised are made immaterial by what we have said.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.